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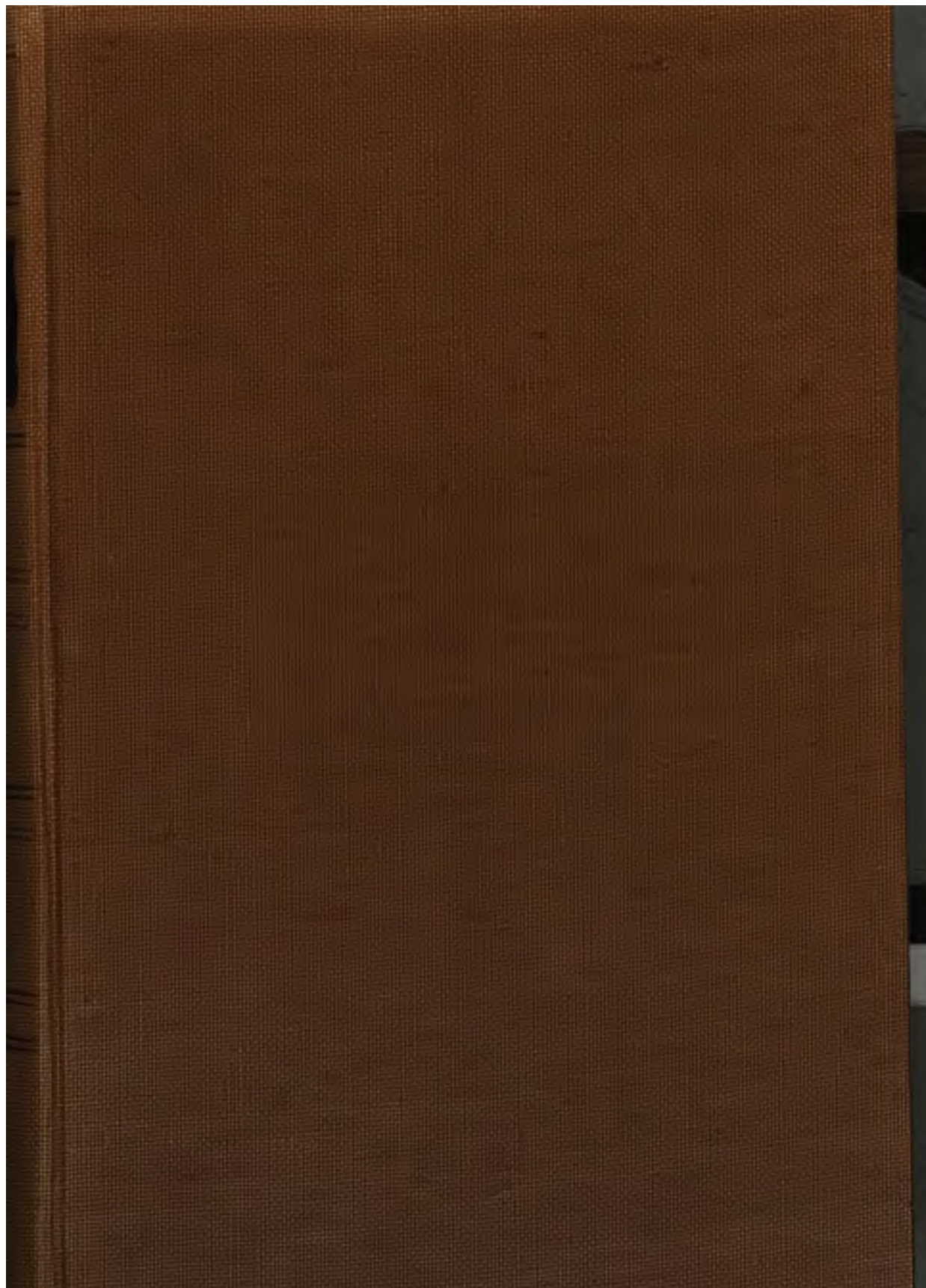
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THE
LAW AND PRACTICE 2028
AS TO
PROBATE, ADMINISTRATION,
AND GUARDIANSHIP,
IN
THE SURROGATE COURTS,
IN
Common Form and Contentious Business:
INCLUDING ALL THE STATUTES, RULES AND ORDERS TO THE
PRESENT TIME,
TOGETHER WITH
A COLLECTION OF FORMS.

BY
ALFRED HOWELL,
OSGOODE HALL, BARRISTER-AT-LAW.

Toronto:
CARSWELL & CO., 26 & 28 ADELAIDE STREET EAST.

MDCCCLXXX.



Entered according to Act of Parliament of the Dominion of Canada in the year of our Lord,
one thousand eight hundred and eighty, By ALFRED HOWELL, in the office of the Minister
of Agriculture.

This Volume

IS

(BY PERMISSION),

RESPECTFULLY INSCRIBED

TO

The Honourable Thomas Moss,

CHIEF JUSTICE OF ONTARIO,

BY

THE AUTHOR.

PREFACE.

As to the necessity created by the erection of the Court of Probate in England for a book on Practice and Procedure, it was said, (a) that for the guidance of the practitioner, there was then (1857) only the "Ecclesiastical Practice" of Mr. Coote, which was little more than a collection of forms, and the article "Practice" in Burns' "Ecclesiastical Law." This remark might have been, with slight qualification, extended to this Province when the Surrogate Courts Act was passed, 1858.

During the twenty-two years which have elapsed several works have been published in England upon the subject, but none directly applicable or adapted to the state of the law and practice in this Province.

General Rules and Orders of the Surrogate Courts of Ontario were made by the Judges appointed under the 14th section of "The Surrogate Courts Act, 1858," which have since continued to be the Rules regulating the procedure and practice in those courts in the matters to which they relate. But these rules are applicable to *common form* business only, leaving the practice, forms, and procedure in *contentious business* unprovided for.

The 32nd Section of the Act, however, enacts that unless otherwise provided for by this Act, or by the Rules or Orders respecting Surrogate Courts theretofore enforced or thereafter to be made under the Act, the practice of the said several Surrogate Courts shall, so far as the circumstances of the case will admit, *be according to the practice in Her Majesty's Court*

(a) D. & B. p. 1.

of Probate in England, as it stood on the 5th December, 1859; a similar general rule being provided in Sections 47 and 52 regarding matters there mentioned.

Under these statutory provisions part of the practice of the English Court of Probate has, in the course of years, become settled practice in the Surrogate Courts of this Province; and in describing that of our own Courts, and the extent to which it follows the former, constant reference is, in the present treatise, made to the English practice. For the purpose also of showing the correspondence between our own and the English practice and procedure as they existed at the date mentioned, reference is frequently made not only to the Reports, but to standard English works, in which the similar practice of the English Court of Probate may be found described, amongst others, to the valuable treatises of Mr. Coote on the Common Form Practice of the Court of Probate, and of Messrs. Coote and Tristram on the Practice in Contentious Business, in their several editions, the former being fully recognised as authority by the English Court in matters of practice (*a*); and to the works of Messrs. Dodd and Brooks, Horsey, Browne, and other learned authors, relating to the subject in hand.

Uniformity of practice in the several Surrogate Courts of the Province, it was thought, might safely be assumed; and where Surrogate Court cases have been cited, they have been taken chiefly from the office in Toronto. Cases disposed of in the former Court of Probate (*b*) of Upper Canada have been taken from the records and papers at Osgoode Hall.

The arrangement of subjects indicated in the first public

(*a*) Per Sir C. Cresswell, *In the Goods of Watts*, 1 Sw. & Tr. 258 (1860).

(*b*) The writer, having served a considerable part of his articulated clerkship under the late much esteemed Registrar of this Court, and in connection with its business, was enabled to avail himself of some experience so acquired.

notice of this work has been somewhat changed. Instead of placing the matter relating to practice under the various sections of the Act in the form of notes, it was found more convenient to place the greater part of it in chapters following the Act.

The importance of this branch of practice would doubtless, ere long, have induced abler hands to undertake the task which is attempted in this volume. In view, however, of the lapse of time since the Surrogate Act was passed, the Revision of the Statutes recently issued, the passage of certain important Statutes, as :—"The Wills Act of 1873;" "The Act relating to estates of small value, 38 Vic. ch. 18;" "An Act respecting Administration by the Crown of Estates of Intestates dying without known relatives in Ontario," 40 Vic. ch. 4;—and of the further divergence of English practice from our own, it appeared that the proper time had arrived for compiling a work specially adapted to the law and practice of our own Courts.

The Author desires to make acknowledgment of the aid and counsel he has received in his labours from many learned gentlemen: to Sir James Robinson, Bart., for free access to the archives of the former Court of Probate for Upper Canada; to the Hon. Mr. Cayley, and J. S. Cartwright, Esquire, Barrister-at-Law, of the Surrogate Office, Toronto, for a similar privilege as to the papers and records of the Surrogate Court here, and for valuable information as to the actual practice; the last named gentleman having kindly revised portions of the work as it passed through the press; to W. Mortimer Clark, Esquire, W.S., Barrister-at-Law, for revising, and adding valuable matter to the pages regarding Scotch Grants; to F. W. Kingstone, Esquire, Barrister-at-Law (who has had much ex

perience in Surrogate Court Practice), for valuable aid in the parts regarding Contentious Business.

A. H.

TORONTO, JULY 1ST, 1880.

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ABBREVIATIONS.

- S. C. A.....Surrogate Courts Act.
S. C. R.....Surrogate Court Rules.
E. C. P.....English Court of Probate.
C. B. or Con. B...Contentious Business.
C. F. B.....Common Form Business.
D. & B.....Dodd & Brooks Law and Practice of the English Court of Probate.
Coote & Tr.....Coote's Common Form Practice of the Court of Probate, with Contentious Practice of the Court by Dr. Tristram.
Where the reference is to Coote, without the edition, the 8th edition is generally to be understood. References to Mr. Horsey's book are to the 3rd edition.

[The body of the document contains several lines of text that are mostly illegible due to extreme blurring and low contrast. The text appears to be organized into paragraphs, but the specific words and sentences cannot be discerned.]

ERRATA.

- Page 2—line 5, *dele* apostrophe after "*Courts*."
- Page 16—first side note, *dele* the words "*to be received in*."
- Page 33—line 1, for "*Foster*" read "*Forster*."
- Page 34—line 22, instead of "*It*" read "*1st*."
- Page 56—line 7 from bottom, insert before the word "*Any*"—"The practice of the English Court of Probate as provided in the rules of 1862, was as follows:—," inserting quotation marks before the word "*Any*" and after the word "*bill*" on the 12th line of page 57; and add "*See also Con. B. p. 393, post.*"
- Page 176—lines 7 and 22, word "*Will's*" *dele* apostrophe, and on pp. 193-4-5, where the same occurs.
- Page 191—line 15, *dele* the words "*Proof of Wills*."
- Page 191—line 16, "*analogous*" should be "*analogous*."
- Page 198—entitling of Sec. V,—for "*of reference*," read "*by reference*."
- Page 223—line 18, insert "*M.S.*" after "*1853*."
- Page 224—note (b), for "*Weby*" read "*Willby*."
- Page 296—note (a), for "*Carke*" read "*Clarke*."
- Page 302—note (a), for "*Mulbrook*" read "*Pulbrook*."
- Page 303—note (c) for "*cotter*" read "*Scotter*."
- Page 317—sec. V, line 9, for "*ab intestate*," read—"ab intestato."
- Page 358—line 15, for section "*15*" read "*18*."
- Page 380—note (c), instead of "*supra*" read "*1 Hagg. 71*."

INTRODUCTION.

THE practice and procedure of the Surrogate Courts of Ontario are governed by :—

Firstly :—The Surrogate Courts Act, R. S. O., ^{Practice, how governed.} c. 46.

Secondly :—The General Rules and Orders made by the Judges appointed under sec. 14, S. C. Act of 1858 (a).

Thirdly :—So far as the circumstances of the case will admit (and unless otherwise provided by the Act or rules referred to), by the practice in Her Majesty's Court of Probate in England, as it stood 5th December, 1859. (See S. C. Act, sec. 32.)

Fourthly :—Except where so provided, then by the practice in Prerogative Court, (b) as it stood 25th August, 1857. (See Eng. Court Prob. Act, 1857, sec. 29.)

The case of *Re Hilts* (1 Chy. Cham. Rep. 386, *Re Hilts*. Mowat, Vice-Chancellor), was decided upon the practice of the Prerogative Court ; the point under consideration not being provided for by our S. C. Act or Rules, or the English Court of Probate practice ; and it was laid down in the case of *Grant v. G. W. Ry.*, ^{Grant v. G. W. Ry.} (c) *Per Draper*, C. J., that the law of England as to granting probate or committing letters of administration, was the law to be administered in the Courts in Upper Canada, created by the Act of 1793, (d) with the same process, pleadings and practice, unless

(a) And by the temporary rules of 31st August, 1858, as held *In re O—*, a Solicitor, 24 Gr. 529. *Vide post*.

(b) i.e. the Prerogative Court of Canterbury. Coote, 8th Ed. p. 18.

(c) 7 U. C. C. P. 438.

(d) *Vide post*, p. 11.

where our statutes express to the contrary, as were in use in the Ecclesiastical Courts in England in relation to probates and letters of administration.

The chief matter of practice left unprovided for by the Surrogate Courts' Act and Rules, and as to which resort must be had to the practice in England, as above referred to, is the practice in contentious business, which is made a feature of this work.

Origin Surro-
gate Courts.

To refer shortly to the origin of the Courts in question, it may be observed that the Surrogate Courts of Ontario, with jurisdiction in matters and causes testamentary, and in relation to the granting or revoking probates of wills and letters of administration of the effects of deceased persons, are an outgrowth of the jurisdiction of the Ecclesiastical Courts of the mother country. To attempt to trace the history of those Courts in England would be much beyond the scope of this undertaking; and, indeed, such an attempt could only succeed in proportion as it might faithfully transcribe or condense what has already been written upon the subject by various learned authors. The circumstance, however, of this being the first work upon the jurisdiction and practice of Surrogate Courts offered in this Province, would seem to require that it should be introduced, by at least some reference to such history, down to the time of abolishing the Court of Probate, and the establishing of the existing Surrogate Courts.

Ecclesiastical
Courts.

The jurisdiction referred to did not originally belong to the Ecclesiastical Courts; for, as remarked in Burns' Ecclesiastical Law, "there were wills before there was any ecclesiastical jurisdiction, and cognizance of cases relating to them pertained solely to the civil magistrate."

"Two constitutions of Arcadius and Honorius, and

of Theodosius, show that the registration of testaments in the office of the Magister Census, or among the records of a court of justice, or of a municipium, was in use among the Romans. The clergy attempted to obtain the privilege of registering wills, and they actually succeeded in doing so; but this usurpation is in strong terms denounced by the Emperor Justin, who, after enacting that the registration of wills shall exclusively belong to the Magister Census, thus reproves the clergy:—"It is absurd to confuse duties by confounding different functions together, so that what is entrusted to one, another takes from him, and this is especially so with regard to the clergy; to whom it is opprobrious to endeavour to show themselves skilful in forensic matters." It appears, from a remarkable law of the Emperor Leo (which transferred the *insinuatio* or registration of wills, from the Magister Census to the Quæstor and certain other magistrates in Rome, and to the Præsides in the Provinces), that the magistrate entrusted with that duty, not only registered the instrument, but authenticated it under his seal upon the faith of the depositions of the subscribing witnesses. From that proceeding the probate of wills in the English Ecclesiastical Courts is probably derived" (Bowyer's Mod. Civ. Law, 130).

Referring to the origin of Ecclesiastical Courts, ^{Ecclesiastical Courts.} Mr. Coote remarks that:—"On the continent they had been in active operation ever since the reign of the Emperor Theodosius, the younger, to whom must be ascribed their first legalization. But even before that age the separation of the Christian body from the nation at large, which still adhered to paganism, in almost all material points, both in practice and opinion, had occasioned many peculiar questions in which their faith might be in some degree compro-

mised or implicated, to be treated upon, and determined by their own assembly, under the supervision of the higher priesthood, and without the intervention of the ordinary civil tribunals of the state. This, we have every reason to regard, as the first germ of the ecclesiastical jurisdiction; an authority peculiar to, and perhaps co-existent with, Christianity itself." And "the Church subsequently acquired a complete power of adjudication, not only over the conduct of clerks, its own revenues and marriages; but also over the accessory questions of dower and alimony, the breach of faith in sworn compacts or promises, *the validity or invalidity of last wills, the enforcement of legacies, and the administration of a deceased person's property*" (a).

In England, prior to the Court of Probate Act, the voluntary and contentious jurisdiction and authority to grant or revoke probates of wills, or letters of administration of the effects of deceased persons, was vested in, and exercised by, ecclesiastical, royal peculiar, peculiar, and manorial courts and persons, and had been from very early times. And it is to be observed that after the establishment of christianity there, and until the conquest, the courts, ecclesiastical and temporal, were conjoined; the bishop and earl sitting together for the transaction of business in the county court. And lords of manors, for some time after the establishment of Ecclesias-

(a) Coote's Eccl. Prac. Ed. 1847, pp. 2-3.

The reason stated, why probate of testaments had been given unto spiritual men was:—"Because it is to be intended that they have more knowledge, what is for the profit and benefit of the soul of the testator, than laymen have; and they will look more than laymen that the debts of the deceased be paid and satisfied out of his goods, and that they will see his will performed, so far as his goods will extend, and see that the goods of the deceased were applied not to the prejudice of their creditors, their families, and their souls." (ib.)

tical Courts in England, retained a jurisdiction with respect to the goods of the deceased vassals.

But as early as the reign of Henry I., testamentary jurisdiction appears to have been vested in the Church. In the preamble of 18 Edward III., c. 6, it is recited, "that causes testamentary notoriously pertain to the cognizance of the holy Church." And the estates of intestates, although continuing for some time to be subject to the general municipal law, were gradually brought under the control of the Ecclesiastical Courts (a).

Upon the accession of the Norman Conqueror to the throne of England, the canon and civil law, ^{Statute of William the Conqueror.} which prevailed upon the continent, began to be introduced. William I., with the aid of his Norman Parliament, made the following enactment:—"I therefore command, and by royal authority ordain, that no bishop or archdeacon hold pleas any more concerning the episcopal laws in the hundred; nor bring to the judgment of secular men a cause which appertains to the government of souls; but whosoever shall be impeached according to the episcopal laws for any cause or fault, shall come to the place which the bishop shall have chosen and named for this purpose, and there answer respecting his cause, and do right to God and his bishop; not according to the hundred, but according to the canons and episcopal laws." "This portion of the Act," Mr. Coote remarks (b), "completely overturned the common law previously existing on the subject." The law of England was now made to conform to the regulations of the rest of Europe. "The ordinance," as he says in another place, "strictly enjoined that

(a) Burns' Eccl. Law, vol. 4, pp. 291-2, citing Sir Henry Spelman, and other learned authors.

(b) Coote's Eccl. Prac., p. 8.

the law of the court should be that of the canons without admixture of municipal principles or customs." And the same extent of jurisdiction which existed on the continent appears to have been transplanted without curtailment (a). "Along with the canon law" (observes Mr. Coote, p. 9), "the Ecclesiastical Courts adopted the practice of the Roman Consistory."

Continental law being thus introduced, many of the most important principles of the Civil and Canon Law soon followed; and from them were taken some of the strongest foundation stones, and some of the most graceful and polished columns which sustain a system of jurisprudence that has stood the test of ages, and at this day stands the admiration of all, and a palladium of strength to enlightened nations both in the old and new world.

The next concession after the Statute of Wm. I. made in England by the civil power to the Church, appears to have been in the reign of Stephen, when jurisdiction over the estates of ecclesiastical persons

(a) Coote's Eccl. Prac., p. 17. The origin of the jurisdiction referred to is closely connected by Mr. Coote with the rise and progress of the Roman Civil Law, citing Selden's edition of *Fleta* as showing that the *Justinianum Corpus* and other collections of law were brought into England between the years 1136 and 1154.

The practice of the Prerogative Court, which is the groundwork of the Court of Probate, is itself founded upon the Civil Law (D. & B., *pref.*).

The Civil Law was not indeed in all cases the text law of that Court; but it was positively so when our own law was silent. The whole of our testamentary law has its basis on the Civil Law; and without an intimate acquaintance with that system, it is impossible to acquire a thorough knowledge of the practice, or to understand the principles of the decisions of the Prerogative Court (see *Moore v. Moore*, 1 Phill. 406 (433); *Shepherd v. Shepherd*, 5 T. R. 51). What is said by the judges in *Reg. v. Mellis*, (10 Cl. & F. 534, 678), of the force of the Canon Law in Great Britain is equally true of the authority thereof of the Civil Law (D. & B. *supra*); and see Blackstone Com. p. 83, and *Hodgins v. McNeil*, 9 Gr. 305, and *Grant v. G. W. Ry.* *supra*.

dying intestate was, by a charter of liberties, vested in the Church.

A further concession was made in the first year of the reign of Richard I., which, however, required confirmation in the succeeding reign; and the prerogative of the Church was confirmed by sec. 27 of *Magna Charta*, as follows: "If any freeman die intestate, his chattels shall be distributed by the hands of his kinsmen and friends, under the view or supervision of the Church, saving unto every one the debts which deceased owed to him."

The privileges and authority of the Church in the matters referred to were still further asserted at a Provincial Synod celebrated at Lambeth, in the year 1260; Boniface then holding the Archiepiscopal See of Canterbury (Coote's *Eccl. Prac.* p. 40).

The next important enactment was made by the Statute of Westminster, 13 Edward I. (1285), which provided, that "When after the death of any person dying intestate, and bound unto some in debt, the goods come to the ordinary to be disposed of, the ordinary shall from henceforth be bound to answer for the debts, so far as the goods suffice in the same manner as executors would be obliged to answer in case he had made a will."

This celebrated Statute appears not to have been so much a concession to the Church, as a corrective, directed against certain abuses, which had crept in; and as to which Mr. Toller (a) states in effect: "that the ordinary converted to his own use, under the name of the Church and poor, the whole of the intestate's property, without even paying the deceased's debts. To redress this palpable injustice the Statute was passed." Another high authority, referring to the same subject, observes that: "In the early periods of

(a) *Toller's Law of Executors*, c. 3.

Statute of
Westminster.

our history, the ordinary had by common law the absolute disposal of the personal property of all intestates; and under the pretext of applying their goods to religious purposes, possessed himself of them, not only in cases where the deceased left widow and children or other near relations, but in defiance also of the just claims of the creditors (a). On this footing the law continued under the Norman kings, and the first sovereigns of the line of Plantagenet; but when the free spirit of our Constitution which had been long labouring under the pressure of the feudal institutions commenced those struggles which ultimately led to its emancipation, the abuses practised by the ordinary in the administration of intestate estates became subjected to correction and control" (b).

It was not until the statute 31 Edward III. c. 11 (1357), that the Ecclesiastical Jurisdiction on this subject was placed upon a solid basis (c), when it was enacted that: "It is accorded and assented that in case where a man dieth intestate, the ordinaries shall cause to be deputed certain of the next and most lawful or honest friends of the intestate deceased to administer, and dispend for the soul of the deceased, and shall answer likewise in the King's Court to others, to whom the deceased was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the ordinaries as executors are in case of testament, as well for the time passed as the time to come."

By subsequent Statutes; viz.: 21 Hen. VIII. c. 5; 22 & 23 Car. II, c. 10; 29 Car II, c. 3, and 1 Jac. II, c. 17, further provisions were made for the faithful

(a) *These charges of extortion against the Church are, by other writers said to be unfounded.*

(b) Dr. Phillimore's Reports, Vol. 1, p. 124.

(c) Coote's Eccl. Prac. 58.

administration of the estates of intestates according to law.

The ecclesiastical jurisdiction, observes Mr. Coote, ^{Canterbury and York.} was separated into the two Provinces of the Archbishops of Canterbury and York; and these again for the purposes of immediate control were subdivided into the dioceses of representative bishops of the Established Church, in addition to which there were minor subdivisions. The Archbishop was superior to all, having been, from the year 1125, legate of the Holy See, as well as Metropolitan. (*Ib.* 64-5.)

Prior to 1443, wills were proved before the Archbishop himself, or his Vicar-General, and the oath was on all occasions actually administered by them. But in that year the first appointment of a Commissary of the Prerogative appears to have been made, when Archbishop Stafford removed from the Court of Arches, of which his official principal was judge, its original jurisdiction over wills and intestacies, transferring the discharge of the office of the prerogative to an entirely new functionary who should preside in a distinct and separate court, dignified with the appellation and style of Commissary of the Prerogative Court of Canterbury. (*Ib.* 81.)

An entire change was effected by 20 & 21 Vic., c. ^{Eng. C. P. Act, 1857.} 77, Imp. Stat. called the Court of Probate Act, 1857, which, reciting that it was expedient that all jurisdiction in relation to the grant and revocation of probates of wills and letters of administration in England should be exercised by Her Majesty by one Court, enacted that:—

“ III. The voluntary and contentious jurisdiction ^{Testamentary jurisdiction of ecclesiastical and other courts abolished.} and authority of all ecclesiastical, royal peculiar, peculiar, manorial, and other courts and persons in England now having jurisdiction or authority to grant or revoke probate of wills or letters of admin-

istration of the effects of deceased persons, shall in respect of such matters absolutely cease ; and no jurisdiction or authority in relation to any matters or causes testamentary, or to any matter arising out of or connected with the grant of revocation of probate or administration, shall belong to or be exercised by any such court or person."

To be exercised
by a Court of
Probate.

" IV. The voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons now vested in or which can be exercised by any court or person in England, together with full authority to hear and determine all questions relating to matters and causes testamentary, shall belong to and be vested in Her Majesty, and shall, except as hereinafter is mentioned, be exercised in the name of Her Majesty in a court to be called the Court of Probate."

The jurisdiction conferred upon the Probate Court was more circumscribed as to wills and estates than that enjoyed by the Ecclesiastical Courts ; the latter having entertained suits for legacies, and the distribution of residues ; which the 23rd sec. of the C. P. Act provides shall no longer be entertained by these Courts (a).

Prerogative
Court practice,
how far fol-
lowed.

The practice of the Prerogative Court prevailed only to a limited extent in the Court of Probate, being controlled by Statute and by Rules and Orders. It is to be observed, however, that the Rules and Orders of the Court of Probate made after 5th Dec., 1859, control that practice to a greater extent than the rules previously in force ; and any matters within the scope of the Surrogate Courts Act as to which the Court of Probate in England then followed the practice of the Prerogative Court, are in Ontario

(a) The S. C. Act, sec. 15, contains a similar provision.

still governed by that practice, unless, of course, provided for by our own Statute and Rules. (*Vide ante* p. 1.)

A further change was effected by the Supreme ^{Judicature} Court of Judicature Act, 1873, whereby the jurisdiction of the Court of Probate in England was transferred and attached to that one of the five divisions of the High Court of Justice called the "Probate, Divorce, and Admiralty Division." More than this passing notice of this last change, which has brought the jurisdiction as to probates and administrations in England to a resting place where it is likely long to remain, will be unnecessary here, as it does not affect the Surrogate Courts of Ontario or their jurisdiction.

The Court of Probate for Upper Canada was established 9th July, 1793, by 33 Geo. III. ch. 8 (2nd ^{Court of Probate, Upper Canada.} Session, 1st Prov. Parlt. of Upper Canada, held at Niagara), which enacted "that there be constituted and established a Court, with full power and authority to issue process and hold cognizance of all matters relating to the granting of probates and committing of letters of administration of the goods of persons dying intestate, having personal estate, rights and credits within this Province, to be called and known by the name of the Court of Probate of the Province of Upper Canada, and that the Governor, Lieutenant-Governor, or person administering the Government thereof, shall preside in the said Court, to hear, give, order, or decree or pronounce judgment in all questions, causes or suits that might be brought before him, relative to the matters aforesaid," with power to him to appoint an Official Principal of said Court, and a Surrogate for each District; and providing that where a testator or intestate died possessed of goods to the amount of £5, in any district, other than

that in which he resided at the time of his decease, or of goods to that amount in two or more districts the granting of probate or administration belonged to the Probate Court only, and not to any Surrogate Court. And sec. 16 provided for an appeal from the Surrogate Courts to the Judge of the Court of Probate (a.)

Surrogate
Courts.

The Court so constituted continued until the Act was repealed by 22 Vic. c. 93 (b), establishing a Surrogate Court, in and for each county, and providing that such courts should have the same powers, and the grants and orders of the said courts the same effect throughout the Province, as the Court of Probate and its grants and orders previously had. This Act, with some amendments, being the present R. S. O. c. 46, is set forth in the following pages.

Jurisdiction of
Court of Chan-
cery as to
Wills.

Section 14, as to the jurisdiction of Surrogate Courts is not, it is enacted, to be construed as depriving the Court of Chancery of jurisdiction in such matters; that court having "jurisdiction to try the validity of last wills and testaments whether the same respect real or personal estate, and whether probate of the will has been granted or not, and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise." (*Vide* The Chancery Act, R. S. O. c. 40, s. 41-42.) And also "in matters testamentary as provided in the 28th to the 30th sections, inclusive, of the Surrogate Courts Act. It was held in the case of *Perrin v. Perrin* (c), that the Court of Chancery might exercise its jurisdiction to try the validity of wills and to pronounce them void, notwithstanding probate may have been granted by the Surrogate Court; and without wait-

(a) See this Statute reviewed in *Grant v. G. W. By.*, *supra*. Per *Drapér*, C. J.

(b) Assented to, 16th Aug., 1858. Fully in force, 1st Sept., 1858.

(c) 19 Gr. 261.

ing until such probate should be revoked. This decision was followed in *Wilson v. Wilson* (a).

In *Perrin v. Perrin*, a bill impeaching a will of which probate had been granted to the plaintiff by the Surrogate Court, stated, that after the probate had been granted, the plaintiff had discovered a subsequent will of the testator, and that this subsequent will was his last will. The wills were of both real and personal estate. On demurrer, that the Court of Chancery had no jurisdiction but the Surrogate Court only—it was held that Chancery had jurisdiction. *Per* the Chancellor, “the question is whether if the paper admitted to probate was proved in solemn form, the *factum* that the paper so proved is the will of the testator is not *res judicata*. I confess I have felt some hesitation as to this, and if the questions presented by this bill were the same as that assumed to be before the Surrogate Court I should incline, I think, to agree with the defendant.” In *Concurrent*. this case the Chancellor remarked that “as to part of the jurisdiction respecting wills conferred upon the Court of Chancery, concurrent jurisdiction is given to the Surrogate Court” (b).

The Court of Chancery also has power to make decrees or orders for the administration of the estate real or personal of a deceased person. (Taylor's Chancery Orders, 3rd Ed. pp. 150, 151, 338.)

The enactment of the E.C.P. Act, sec. 71 empowers that court to appoint a receiver of real estate, *pendente lite*; but this has not been followed by the S.C. Act; and when a receiver is required in Ontario application is made to Chancery. Referring to this section Mr. Horsey (p. 46) remarks “that it is a use-

(a) 22 Gr. 39, and 24 Gr. 377.

(b) Since these decisions the Chancery Act (sec. 41) has been amended by the introduction of the words “whether probate of the will has been granted or not.”

ful and much needed clause ; that it was sometimes inexpedient for parties who were devisees of legal estates under a disputed will to take possession of the property pending a litigation, as they might have to account in an inconvenient manner for their receipts and dealings therewith ; the Court of Chancery had no power to appoint a receiver unless the devise was of a *trust estate*, and the party applying were a *cestui que trust*. If he had the legal estate there were no reason, so far as the Court of Chancery was concerned, for his not taking possession. If he were an infant then the Court would appoint a receiver on a bill for an account, and upon some allegation that persons had entered, and were receiving rents under his title." (a)

The Surrogate Court, however, will grant administration *pendente lite* wherever the Court of Chancery would appoint a receiver (*vide post*).

Appeals.

The only other matter to be mentioned in these introductory remarks is that while the right of removing causes, under certain circumstances, from Surrogate Courts to the Court of Chancery remains unaltered, an important change is effected by 40 V. c. 7 (incorporated in sec. 31, S. C. Act), by which appeals from Surrogate Courts are to be heard by the Court of Appeals, instead of the Court of Chancery as formerly. The Act itself is set forth in the following pages.

(a) Horsey's Court of Probate Acts.

PART I.

A N A C T

RESPECTING

SURROGATE COURTS.

REVISED STATUTES OF ONTARIO, CAP. 46.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as “THE SURROGATE Short Title.
COURTS ACT.”

Interpretation.

2. Wherever the following words and expressions occur in this Act, they shall be interpreted as follows, unless the context is inconsistent with the meaning hereby assigned :

(1) “Will” shall comprehend “testament” and all “Will” other testamentary instruments of which probate may now be granted ;

(2) “Administration” shall comprehend all letters of administration of the effects of deceased persons, whether with or without the will annexed, and whether granted for general, special or limited purposes ;

NOTE.—When sections of this Act appear to follow provisions of the English Court of Probate Act, it is indicated by the letters—“ E. C. P. Act,” in the margin. The references to C. S. U. C. and other statutes of which this is a consolidation are not repeated. *Vide* *Prod. R. S. O.* p. lviii.

Matters and causes to be received in testamentary.

(3) "Matters and causes testamentary" shall comprehend all matters and causes relating to the grant and revocation of probate of wills or letters of administration ;

Common form business.

(4) "Common form business" shall mean the business of obtaining probate or administration, where there is no contention as to the right thereto, including the passing of probates and administration through a Surrogate Court, when the contest is terminated, and all business of a non-contentious nature to be taken in a Surrogate Court in matters of testacy and intestacy, not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration.

Surrogate Courts.

A Surrogate Court to be in each County with Judge and Registrar, &c.

3. In and for each County in Ontario, there shall be a Court of Law and Record, to be called "The Surrogate Court" of each respective County over each of which one Judge shall preside; and there also shall be a Registrar and such officers as may be necessary for the exercise of the jurisdiction to the said Courts belonging.

The Judge is also "Real Representative" under the Partition Act. R. S. O. c. 101.

Courts to have seals.

4. Each of the said Surrogate Courts shall be provided with a suitable seal, to be approved of by the Lieutenant-Governor, and the Judges of the said Courts may respectively cause the same, from time to time, with the approval of the Lieutenant-Governor, to be broken, altered or renewed; and all probates, letters of administration, grants, orders, letters of guardianship, and other instruments and exemplifications, and copies thereof respectively, purporting to be sealed with the seal of any Surro-

Probate &c., sealed to be received in evidence.

gate Court, shall, in all Courts and in all parts of E. C. P. Act, Ontario, be received in evidence, without further ^{sec. 22.} proof thereof.

Probates of wills, and grants of administration with Registration of the will annexed, are among the "Instruments" referred to Probates, &c. in the Registry Act, R. S. O. c. 111, sec. 2, and may be registered (sec. 36) on production of the probate or letters, or an exemplification thereof, under the Seal of any Court in this Province or in Great Britain and Ireland, or in any British Province, Colony or Possession, or in any foreign country having jurisdiction therein, and by the deposit of a copy of such probate or letters of administration, with an affidavit verifying such copy (sec. 63); and wills or probates registered within twelve months after the death, shall be as valid against subsequent purchasers and mortgagees, as if registered immediately after such death; further time being allowed in case of impediments referred to (sec. 75).

In actions at law or suits in equity, letters probate and Letters, letters of administration, with the will annexed, or a copy, evidence, stamped with the seal of the Surrogate Court, or the seal of the Court of Chancery, if the grant was by the former Court of Probate, are by R. S. O. c. 62, secs. 41-44 made *prima-facie* evidence of a devise or testamentary disposition; and they are *prima-facie* evidence of the validity of the will, and of testamentary capacity (*Stewart v. Lees*, 24 Gr. 433, and see *De Harte v. De Harte*, 26 C.P. 489). Letters probate are evidence of the testator's death, as well as of the will itself (*Davis v. Van Norman*, 30 U. C. Q. B. 437).

Probate conclusively establishes in all Courts that the will was executed according to the law of the country where the testator was domiciled, but not the question of domicile itself (*Whicker v. Hume*, 6 W. R. 813); and *vide post*, chapter on Probate.

5. The Surrogate Court of each County shall ^{Sittings where} hold its sittings in the County Town of the County. ^{held:}

Judges.

6. The Senior Judge of the County Court in each ^{Judges of} County shall be *ex-officio* Judge of the Surrogate ^{County Courts} Court for the County; and in case of the illness or ^{to be *ex-officio*} ^{Judges of Sur-} ^{rogate Courts.}

Junior Judge
same powers,
etc.

absence, or at the request of any Judge of a Surrogate Court, or in case the office of Senior Judge is vacant, the Junior or acting Judge or the Deputy Judge (if any) of the County Court, shall have all the powers and privileges and perform all the duties of the Judge of the Surrogate Court. See Rev. Stat. c. 42, s. 11.

The judge of a Surrogate Court was on grounds of public policy held to be exempt from imprisonment for debt. *Per* Robinson, C. J. in *Michie v. Allan*, 7 Q. B. 482. (This decision was before the Statute abolishing imprisonment for debt.)

A Surrogate Judge prepared gratuitously the petition, bond and affidavits upon an application by a widow in poor circumstances for administration. Held that he was not liable to the penalty of C. S. U. C. c. 15, s. 5, as amended by 29 Vic. c. 30; the mischief against which that enactment is directed being the doing of the acts prohibited for profit. (*Allen, quita* *tam*, v. *Jarvis*, 32 Q. B. 56.)

Judges to take
oath of office.

7. Every Judge of a Surrogate Court appointed after this Act comes in force, shall, before executing the duties of his office, take the following oath before some one authorized by law to administer the same :

Form of
Judge's oath.

"I, _____, do solemnly
"and sincerely promise and swear that I will duly
"and faithfully, and according to the best of my
"skill and power, execute the office of Judge of the
"Surrogate Court of the County (or United Counties,
"as the case may be) of _____, So help
"me God."

Surrogate Clerk.

Surrogate
Clerk to be ap-
pointed—his
duties.

8. There shall be a Clerk to be called the Surrogate Clerk, who shall perform the duties required of the Surrogate Clerk by this Act, as well as the duties that, by the Rules and Orders heretofore in force relating to Surrogate Courts, or to be hereafter made under this Act, are required of such Surrogate

Clerk, and also such other duties as may be required of him by the Court of Chancery ; and such Surrogate Clerk shall be deemed an officer of the said Court of Chancery ; and shall be paid a fixed salary not exceeding one thousand six hundred dollars yearly, ^{His salary.} and the Lieutenant-Governor shall from time to time appoint and at his pleasure remove such Clerk.

The duties required of the Surrogate Clerk under the Act are set forth in §§ 39, 40, 41, 42, 43 and 46. As an officer of the Court of Chancery he has the custody of the books, papers and documents of the former Court of Probate which are under the control and direction of the Court of Chancery (*vide post*, § 78).

Registrars.

9. On the death, resignation or removal of the Registrar of any Surrogate Court, the Clerk of the County Court shall be *ex officio* Registrar of the Surrogate Court ; but this provision shall not apply to the Registrar of the Surrogate Court of the County of York, or to the Clerk of the County Court of the said County. ^{Who to be Registrar.}

The word "Registrar" includes Registrars and their Deputies. R. S. O. p. 5.

(2) The Lieutenant-Governor shall appoint a Registrar of the Surrogate Court of the said County of York, to hold office during pleasure, and upon the death, resignation or removal of such Registrar, shall supply the vacancy. ^{County of York.}

10. Every Registrar of a Surrogate Court appointed after this Act takes effect, shall, before he shall be entitled or qualified to act as Registrar under this Act, take the following oath before the Judge of the Court, or some other person authorized by law to administer the same : ^{Form of Registrar's oath.}

" I, — — —, do solemnly and sincerely promise

"and swear that I will diligently and faithfully
 "execute the office of Registrar of the Surrogate
 "Court of the County (*or United Counties, as the*
"case may be) of —, and that I will not know-
 "ingly permit or suffer any alteration, obliteration,
 "or destruction, to be made or done by myself or
 "others on any wills or testamentary papers or other
 "documents or papers committed to my charge. So
 "help me God."

Registrar to
 have office, if
 room in Court
 House.

Depository
 for wills of
 living persons

(E. C. P. Act,
 sec. 91.)

11. The Registrar of every Surrogate Court shall hold his office in the Court House of the County, and a room therein shall be provided for that purpose, and in the event of there being no room in the Court House, every such Registrar shall, until such room is provided, hold his office at such place as the Judge of the Court directs; and the office of every Registrar shall be a depository for all wills of living persons, given to such Registrar for safe keeping, and all persons may deposit their wills in such depository upon payment of such fees and under such regulations as may from time to time be directed by rules or orders in that behalf, heretofore in force, or hereafter made under this Act.

Wills of Living Persons.—This provision is a great convenience to persons going abroad, and others desiring to guard against the will falling into the hands of any but the proper parties in case of the testator's death. The affidavit of execution by subscribing witness may be made and deposited with the will. It should be sealed up in an envelope properly endorsed, and the Registrar, upon its being deposited, will give a receipt which should be produced to him if the will is required to be taken out again for alteration or any other purpose. They are not allowed to be searched or inspected during the life of the testator.

Registrars to
 preserve testa-
 mentary in-
 struments,
 papers, etc

12. The Registrar of every Surrogate Court shall file and preserve all original wills and testamentary instruments of which probate or letters of adminis-

tration with the will annexed is granted in such Surrogate Court, and all other papers used in any matter in such Court, subject to such regulations as may from time to time be made by any rules or orders under this Act in relation to the due preservation thereof, and the convenient inspection of the same. (E. C. P. Act, sec. 52.)

Delivery of Will out of Registry.—The Court of Probate will rarely allow a testamentary paper, which has been admitted to probate, to be delivered out of the Registry (*Hall deceased*, 27 L. J. 38; *Manfredi deceased*, 1 Sw. & Tr. 135). But it has allowed the original document to be delivered out for the purpose of its being placed in proper custody, requiring an authenticated copy to be substituted for it (*Nicholson deceased*, 2 Add. 333; *Russell deceased*, 1 Hagg. 91; and *Bona-parte deceased*, 2 Rob. 606).

Registrars to produce Wills, &c., on Subpœna.—An *ex parte* order, under R. 31, T. T. 1856, will be granted in the first instance, for a subpœna to issue to a Registrar of the Surrogate Court, for the production of an original will, upon affidavit that said will is necessary to establish the case of the party applying, and that no notice has been given of his intention to use the probate or letters of administration *cum test. annex.* of same, and showing good reason for not having given, or for not giving such notice (*Sladden v. Smith*, 3 U. C. L. J., 1856, 233, C. L. Chambers, Hagarty, J.)

Searches.—A person desiring to see the register, or to inspect a will or other papers in the Office of the Registrar makes a search, for which a fee is payable under the tariff. Wills proved in the former Court of Probate are to be found in the custody of the Surrogate Clerk in Chancery at Osgoode Hall (*vide post* sec. 78); also, copies of all wills proved in any Surrogate Court since the Surrogate Courts Act (*vide* sec. 13). Wills of real estate only, are sometimes found in the Registry for deeds, having been recorded there, and not proved in a Surrogate Court.

13. On the first Tuesday of every month, or oftener, if required by any rule or order respecting Surrogate Courts in force at the time of the passing of this Act, or hereafter made under this Act, every Registrars to transmit to Surrogate Clerk list of probates, &c

Registrar of a Surrogate Court shall transmit by mail to the Surrogate's Clerk, a list in such form and containing such particulars as may from time to time be required by such Rules and Orders, of the grants of probate and administration made by such Surrogate Court up to the last preceding Saturday, and not included in any previous return, and also a copy certified by such Registrar to be a correct copy of every will to which any such probate or administration relates, and such Registrars shall in like manner make a return of every revocation of a probate or administration.

(E. C. P. Act,
sec. 51.)

See *post*, s. 39.

Jurisdiction and Powers of the Surrogate Courts.

(E. C. P. Act,
sec. 4.)

Testamentary
jurisdiction to
be exercised
by the Surro-
gate Courts.

(E. C. P. Act,
sec. 4.)

11. All jurisdiction and authority, voluntary and contentious in relation to matters and causes testamentary, and in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons having estates or effects in Ontario, and all matters arising out of or connected with the grant or revocation of probate or administration, shall continue to be exercised in the name of Her Majesty, in the several Surrogate Courts; but this provision shall not be construed as depriving the Court of Chancery of jurisdiction in such matters.

"Voluntary," *i.e.*, common form business; see Interpretation clause, sec. 2, s-s. 4, *ante*. It may also include the proving of the will by the executor in solemn form of his own motion. (*Vide* chapter on Contentious Business.)

"Contentious;" matters and causes testamentary. (See *ante* sec. 2, s-s. 3, and chapter on Contentious Business, *post*.)

"Effects;" this word in a will comprises the entire personal estate of the testator, unless restrained by context; but will not *proprio rigore* comprehend land. (Jarman, 3rd edition, 689, 715; and *Re O'Loughlin*, L. R. 2 P. & D. 102.)

15. The said Surrogate Courts respectively shall have full power, jurisdiction and authority : Powers and jurisdiction of Surrogate Courts.

(1) To issue process and hold cognizance of all matters relative to the granting of probates, and committing letters of administration, and to grant probate of wills and commit letters of administration of the goods of persons dying intestate, having estate, goods, rights or credits in Ontario, and to revoke such probate of wills and letters of administration ;

The grant, when made, has effect over the *personal estate* of the deceased in all parts of Ontario : see sec. 16, sub-sec. 4, and sec. 33.

(2) To hear and determine all questions, causes, and suits in relation to the matters aforesaid, and to all matters and causes testamentary ; and

(3) Subject to the provisions herein contained, such Courts respectively shall also have the same powers, and the grants and orders of the said Courts shall have the same effect throughout all Ontario, and in relation to the personal estate of deceased persons, as the former Court of Probate for Upper Canada, and its grants and orders respectively, had in relation to those matters and to causes testamentary within its jurisdiction, and to those effects of deceased persons dying possessed of goods and chattels, over twenty dollars in value, in two or more Counties in Upper Canada ; and all duties which, To have the same powers as the former Court of Probate in certain matters. *Bona notabilia.* by statute or otherwise, were imposed on or exercised by the said Court of Probate, or the Judge thereof in respect of probates, administrations, and matters and causes testamentary, and the appointment of guardians and otherwise, shall be performed by the said several Surrogate Courts and the Judges thereof within their respective jurisdictions ; but no suits for legacies or suits for the distribution

of residues shall be entertained by any of the said Surrogate Courts.

As to signification of words "personal estate" and "chattels": *vide Paterson v. Kerr*, 25 Gr. 583.

As to Court of Probate, its powers and duties: *vide ante*, Intro.

As to proceedings for appointment of guardians: *vide post*.

This last clause is the same provision as contained in sec. 23 E. C. P. Act. As to rights of legatee and next of kin to have estate administered, and distribution made under decree of the Court of Chancery: *vide Taylor's Chy. Ord.*, 3rd ed. 338, *et seq.*

To what particular Courts the grant of Probate or administration shall belong (1)

16. The grant of probate or letters of administration shall belong to the Surrogate Court for the County in which the testator or intestate had, at the time of his death, his fixed place of abode;

(E. C. P. Act, s. 46). (1) The caption "Effect of Domicile" in the corresponding sec. C. S. U. C., is omitted from the R. S. O.

Fixed place of abode.—In the use of this phrase, our statute appears to follow sec. 46 of the Imperial Statute, by which, as between different district registries, the right of a district registrar of the Court of Probate to grant probate or administration is made to depend upon the fact that the testator or intestate had, at the time of his death, a fixed place of abode within the district in which the application is made. If deceased had a fixed place of abode out of England, application for a grant there must be made to the principal Registry.

The phrase quoted is comprehended in the legal definition of the word domicile, as given by acknowledged high authority. (For such definition *vide post*, —, "Wills proved and grants made according to foreign law.") So that, if, in any case, it be proved that the deceased had "his fixed place of abode" in any County in Ontario, the question of domicile is disposed of, so far as proceedings under this Act are concerned. Where, however, it is shown that he resided out of Ontario (the case mentioned in the following sub-section), questions may arise depending upon the law of domicile. (See further as to grants made according to foreign law, *post*).

Proper Court.—Letters of administration or letters probate must be granted by the proper Court, for if granted by an incompetent authority they are void (1 Salk. 32; 1 P. Wm. 44, 767; *Allison v. Dickenson*, 1 Hardr. 216). *Sed quare* whether such grants would now be only voidable (*vide* sec. 16, sub-sec. 4; and ss. 34 & 35).

Where application for the grant is made to more than one court, a Judge in Chancery will determine what Surrogate Court has the jurisdiction to make it (*vide* secs. 43 & 44 *post*).

(2) If the testator or intestate had no fixed place of abode in, or resided out of Ontario at the time of his death, such grant may be made by the Surrogate Court for any county in which the testator or intestate had personal or real estate at the time of his death;

A mortgage held by deceased is personalty in the county where the lands lie, so as to give the Surrogate of that county jurisdiction (*Re Thorpe*, 15 Gr. 80). Upon the transmission of property in any registered ship or share therein by the will or intestacy of the owner, the declaration of ownership required for purposes of registration under the Merchants' Shipping Act is to be accompanied by Probate or letters of administration (*vide* sec. 59 of that Act). And it is probable that in analogy to the English law (Imp. Stat. 27 & 28 Vic. c. 56, s. 4, as to stamp duties), a ship or a share in a ship would be held part of the personalty in the county in which is her port of registry, notwithstanding at the time of the death of the owner such ship may be at sea, or elsewhere out of the Province.

(3) In other cases the grant of probate or letters of administration shall belong to the Surrogate Court of any County;

This provision is introduced by 40 Vic. c. 7, as an amendment. The grant is not to be revoked on the ground that deceased had no fixed place of abode in any particular county (sec. 35 *post*).

(4) Probate or letters of administration by whatever court granted shall, unless revoked, have effect

Effect of Probate and administration.

over the personal estate of the deceased in all parts of Ontario;

Formerly it was the letters of the Court of Probate only that took effect over the whole Province.

Orders and Decrees, How Enforced.

Powers of Courts to enforce their orders and decrees to be similar to those vested in County Court for like purposes.

(E. C. P. Act § 2, 5 & 56).

17. Every Surrogate Court shall have the like powers, jurisdiction and authority for enforcing the attendance of persons required by it as aforesaid, and for punishing persons failing, neglecting or refusing to produce deeds, evidences or writings, or refusing to appear, or to be sworn, or to make affirmation, or to give evidence, or guilty of contempt, and generally for enforcing all orders, decrees, and judgments made or given by the Court under this Act, or under any other Acts giving jurisdiction to Surrogate Courts, and otherwise in relation to the matters to be enquired into and done by or under the Orders made under this Act, as are by law vested in the County Courts, as Courts of Law, and were prior to the nineteenth day of December, 1868, vested in said County Courts as Courts having equitable jurisdiction for such purposes, in relation to any suit or matter depending in such Courts.

Powers to Try by Jury.

Courts may cause questions of fact to be tried by a jury at a County Court sitting, and in like manner as in County Courts.

18. The said several Surrogate Courts may cause any question of fact arising in any proceeding under this Act, to be tried by a jury before the Judge of the Court; and upon order being made allowing a trial by jury, such trial shall take place at some ensuing sittings of the County Court for the County, and be conducted in the same manner as other trials by jury in the County Courts; and the parties shall be entitled to their right of challenge, and, for all purposes of or auxiliary to the trial of questions of

fact by a jury before a Judge of the Surrogate Court; and, in respect of new trials, the said Surrogate Courts and the Judges thereof respectively, shall have the same jurisdiction, power and authority in all respects as belong to the County Court, and the Judges thereof, for like purposes. (E. C. P. Act, secs 35, 36 and 37.)

19. When any such question is ordered to be tried by a jury before the Judge of a Surrogate Court, the question shall be reduced into writing (a) in such form as the Court directs, and at the trial the jury shall be sworn to try the said question, and a true verdict give thereon according to the evidence, and upon every such trial the Judge of the Surrogate Court shall have the same powers, jurisdiction and authority as belong to the Judge of a County Court sitting for the trial of issues of fact.

An heir at law, who is a party to the cause, upon making application to the Court for that purpose, has a right in all cases to have questions of fact tried by a jury (*vide post*). Heir at law entitled to jury.

In other cases it is within the discretion of the Court to direct questions of fact to be tried with or without a jury. Where the only issue raised is as to the due execution of the will, the Court invariably directs the cause to be tried without a jury. Where the issues raised are testamentary capacity, undue influence, or fraud, it is the practice of the Court on application made by either party to grant a jury. But where the cause from the nature of the issues of the fact raised is a more proper one to be tried before the Court itself, than by a jury, it will on application of either party be directed to be tried without a jury; unless such application is opposed by the heir at law. Thus, where the plaintiff propounded the contents of a lost will, as universal legatee, and the defendants pleaded that the contents were not those alleged, the plaintiff's application for a jury was refused. (*Quick v. Quick*. 3 Swab. & Tris. 460.) So also where the main question to be decided being one of mixed law and fact, the presumptive revocation of a will, a jury was refused. (*Smith v. Hoal*. 3 Swab. & Tris. 462.)

(a) For form of question for jury, see Appendix.

Under the E. C. P. Act when the Judge directs a question of fact to be tried by a jury, he may direct it to be tried by a common or special jury, either before the Court itself or by means of an issue directed to any of the Superior Courts of Common Law in the same manner as an issue may be directed by the Court of Chancery. (*Bushell v. Blenkhorn*, 1 L. R. P. & D. 89.)

Power of Judge discretionary.

The power of the Judge to direct an issue is discretionary and to be exercised only where it would be a discreet exercise of such power (*Cooper and Sparks v. Moss and Moss*, 1 Swab. & Tris. 143, Coote's Prac : 6th ed. 275).

Terms.

Terms prescribed.

Contentious cases.

20. In order that certain stated times may be fixed for hearing and determining matters and causes in contentious cases, and business of a contentious nature in the said Surrogate Courts respectively, there shall be four terms or times of sitting in each year for the purposes aforesaid, which (except in the County of York) shall severally commence on the first Monday in the months of January, April, July and October, and end on the Saturday of the same week :

In the County of York.

(2) The terms of the Surrogate Court of the County of York shall commence on the first Monday in January and April, and on the second Monday in June and October, in each year, and shall end on the Saturday of the same week ;

Giving judgment after Term.

(3) And the Judges of the several Courts may appoint one or more days for the giving of judgment after Term, in the same way as is provided by law in respect to County Courts.

Witnesses, Evidence, &c.

Power to require attendance of parties or witnesses, and to examine them.

21. Every Surrogate Court may require the attendance of any party in person, or of any person whom it may think fit to examine or cause to be

examined in any suit or other proceeding in respect of matters or causes testamentary and may examine, or cause to be examined upon oath or affirmation, as the case may require, parties and witnesses by word of mouth, and may either before or after, with or without such examination, cause them or any of them to be examined on interrogatories, or receive their or any of their affidavits or solemn affirmations, as the case may be; and each of the said Courts may, by writ of *subpœna* or *subpœna duces tecum* (as the case may be) require such attendance, and order any deeds, evidences or writings to be produced before itself or otherwise.

(E. C. P. Act, s. 24.)

As to production of deeds and instruments, &c.

22. Whether any suit or other proceeding be or be not pending in the Court, with respect to any probate or administration, every Surrogate Court may, on motion or petition, or otherwise in a summary way, order any person to produce and bring before the Registrar of the Court or otherwise, as the Court may direct, any paper or writing, being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person.

Orders and proceedings in respect to the production of instruments purporting to be testamentary.

(E. C. P. Act, s. 26.)

The application may be made to the Judge, either by motion or by summons when a suit is pending, or by motion upon affidavit when no suit is pending. The costs of the application are in the discretion of the Court; but it is laid down that wherever compulsory process is necessary for the purpose of getting a will lodged in the Registry, the expense should fall on the party who occasions it. (*Cunningham vs. Seymour*, 2 Ph. 250.) If the Judge make the order, it may be enforced by the usual process of contempt. (D. & B. 795, 797; and see Rule 17, Form 28.)

(2) If it be not shown that any such paper or writing is in the possession or under the control of such person, but if it appears that there are reasonable grounds for believing that he has knowledge of

Examination of persons touching such instruments.

any such paper or writing, the Court may direct such person to attend for the purpose of being examined before the Registrar or in open Court, or upon interrogatories respecting the same, and such person shall be bound to answer such questions or interrogatories, and if so, ordered to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case default in not attending, or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the Court, and had made such default; and the costs of any such motion, petition or other proceeding shall be in the discretion of the Court (a).

Judges, Registrars and Commissioners in Superior Courts to have power to administer oaths.

23. The Judges and Registrars of the said Surrogate Courts respectively shall have full power to administer oaths in matters and causes testamentary and in all other matters in any of the said Courts; and Commissioners for taking affidavits in any of the Superior Courts, shall also have full power respectively to administer oaths in all matters and causes testamentary, and in all other matters in the said Courts, to parties desirous of making affidavit or deposition before them respectively.

Section 16 of C. S. U. C. c. 16 is as follows:—

Penalty for forger or counterfeiting seal or signature of officers or tendering same in evidence.

(E. C. P. Act, s. 28.)

16. *If any person forges the signature of any Judge or Registrar of a Surrogate Court, or of any Commissioner for taking affidavits as aforesaid, or forges or counterfeits any Seal of a Surrogate Court, or knowingly uses or concurs in using any such forged or counterfeit signature or seal, or tenders in evidence any document with a false or counterfeit signature of such Judge, Registrar, or Commissioner, or with a false or*

(a) As to costs, see preceding note.

counterfeit seal, knowing the same signature or seal to be false or counterfeit, such person shall be guilty of felony, and liable to be imprisoned in the Provincial Penitentiary for any term not exceeding seven years.

Evidence in Contentious Matters.

24. Subject to the regulations established by the Mode of taking evidence in contentious matters.
the Rules and Orders heretofore in force respecting Surrogate Courts, or hereafter to be made under this Act, the witnesses, and, where necessary, the parties in all contentious matters where their attendance can be had, shall be examined orally by or before the Judge of the Surrogate Court in open court; and subject to any such regulations as aforesaid, the parties may verify their respective cases by affidavit but the deponent in every such affidavit shall, on the application of the opposite party, be subject to be cross-examined by or on behalf of the opposite party orally in open court as aforesaid, and, after such cross-examination, may be re-examined orally in open court as aforesaid by or on behalf of the party by whom such affidavit was filed (a). (E. C. P. Act, s. 31.)
When affidavits may be used.
Subject to viva voce examination.
(See s. 31 E. C. P. Act.)

Commissions to Examine Witnesses.

25. Where a witness in any such matter is without the limits of Ontario, or where by reason of his illness or otherwise, the court does not think fit to enforce the attendance of the witness in open court, any of the said Surrogate Courts may order a commission to issue for the examination of such witness on oath upon interrogatories or otherwise, or, if the witness be within the jurisdiction of the court, may order the examination of such witness on oath upon interrogatories or otherwise before any person to be named in such order for the purpose. Courts may issue Commissions for the examination of witnesses.
(E. C. P. Act, s. 32.)

(a) *Vide* secs. 14, 15 & 40.

Provisions of
certain Acts
to apply.

26. All the powers given to the County Courts by law for enabling the said Courts to issue commissions and make orders for the examination of witnesses in actions depending in such Courts and to enforce such examination; and all the provisions of law relating to County Courts for enforcing examinations, or otherwise, applicable thereto and to the witnesses examined, shall extend and be applicable to the said several Surrogate Courts and to the examinations of witnesses under the commissions and orders of the said Courts and to the witnesses examined as if such Courts were County Courts, and the matter before them respectively were an action pending in a County Court.

Commission
for examina-
tion of wit-
nesses.

The application for a commission is made on motion, and should be supported by affidavit, stating that issue has been joined, or if it has not been joined, some satisfactory reason to induce the court to interfere. The affidavit should also state the names of at least some of the witnesses proposed to be examined, or otherwise describe who they are. It should also state that they are material and necessary witnesses in the cause. It should further disclose either that the witness is out of the jurisdiction of the court, or that he will be so at the time of trial, being about to leave the country; or, that he is in such a precarious state of health as to render it highly probable that he will be unable to attend the trial. The court will not grant the application if it can be shown that it is made for delay or from a sinister motive (*Sparkes v. Barrett*, 5 Scott, 402).

Form of the Order.—The order will be for the examination of the witness on oath upon interrogatories, or more frequently *viva voce*, or both, or otherwise, as the court may think fit, before any person to be named in such order for the purpose. The order or some subsequent order, should point out the time and place for and the manner of examination (1 Chitty Arch., 10 ed. 311; and see R. S. O. c. 62, as to witnesses and evidence). An original will may be sent abroad annexed to a commission for examination of an attesting witness, upon an authenticated copy

being left in the registry. (*Foster v. Foster*, 33 L. J. P. & M. 113.)

Rules of Evidence.

27. The rules of evidence observed in the Superior Courts of Law shall be applicable to and observed in the trial of all questions of fact in the said several Surrogate Courts (a). Rules of evidence in Superior Courts to be observed.
(Sec. 33 E. C. P. Act.)

Reference to a Superior Court.

28. In every case in which there is contention as to the grant of probate or administration, and the parties in such case thereto agree, such contention shall be referred to and determined by either of Her Majesty's Superior Courts of Law, or by the Court of Chancery on a case to be prepared, and the Surrogate Court having jurisdiction in such matter shall not grant probate or administration until such contention is terminated and disposed of by judgment, decree or otherwise. In cases of contention, the matter may, by consent, be referred for adjudication to one of the Superior Courts.

Removal to the Court of Chancery.

29. Any cause or proceeding in the said Surrogate Courts in which any contention arises as to the grant of probate or administration, or in which any disputed question may be raised (as to law or facts) relating to matters and causes testamentary, shall be removable by any party to such cause or proceeding into the Court of Chancery by order of a Judge of the said Court, to be obtained on a summary application supported by affidavit, of which reasonable notice shall be given to the other parties concerned. In certain cases of contention, matter to be referred to Chancery.

On motion before the Court of Chancery to remove a cause from the Surrogate Court of Lanark and Renfrew on the ground that there was a contest and on account of delay,

(a) And see Act respecting witnesses and evidence, R. S. O. c. 62.

Removal of
cause to Chan-
cery.

Not every case
of contest.

Terms as to
costs.

Certain cases
not to be so re-
moved.

\$2,000 person-
al estate.

it was held that causes which may be removed to the Court of Chancery must be not only causes in which contention arises, but causes in which disputed questions of law or fact arise. In this case different parties having applied for administration, there was a contest as to who was entitled to the grant. There being such contest, there must be a citation, and to decide it the matter should be argued in term, (before the Surrogate Judge). And as to the question of delay the Surrogate Court has power to appoint an administrator pending the litigation. The Court did not think that the legislature intended every case of contest to be removed to this Court. Motion refused. (*Per Blake, C. Spragge, V. C.*, concurring. *Re Beckwith*, 5 U. C. L. J., 1859, p. 256).

There was a controversy as to the validity of a will, and upon a sworn allegation, which was not contradicted, that there was a large amount of property real and personal (over \$2,000) and that "the questions to be tried and determined were of such importance and difficulty that the same could be more effectually tried and disposed of in the Court of Chancery than in the Surrogate Court,"—the matter was removed to Chancery. *In re Eccles*, 1 Chan. Cham., 376, and *Umwien v. Mowat*, Atty.-Gen., by order of 17 Sep., 1875.

Costs on Removal.—In cases which by the Surrogate Courts' Act are proper to be removed into the Court of Chancery, the Court will not as to the proceedings in Chancery restrict the party to Surrogate Court costs. (*Re Lee & Waterhouse*, 5 U. C. L. J., (1859), p. 256, and *Harris v. Harris*, 24 Gr. 462).

(2) The Judge making such order may impose such terms as to payment or security for costs or otherwise as to him seems fit; but no cause or proceeding shall be so removed unless it is of such a nature and of such importance as to render it proper that the same should be withdrawn from the jurisdiction of the Surrogate Court and disposed of by the Court of Chancery, nor unless the personal estate of the deceased exceeds two thousand dollars in value.

The order is obtained on motion in Chambers upon notice. For a form of such an order, *vide App.* The Registrar of the Surrogate Court upon being served with the order will transmit the papers to the Registrar in Chancery.

30. Upon any cause or proceeding being so removed as aforesaid, the Court of Chancery shall have full power to determine the same, and may cause any question of fact arising therein to be tried by a jury, and otherwise deal with the same, as with any cause or claim originally entered in the said Court of Chancery and the final order or decree made by the said Court of Chancery in any cause or proceeding removed as aforesaid, shall for the guidance of the said Surrogate Court, be transmitted by the Surrogate Clerk to the Registrar of the Surrogate Court from which such cause or proceeding was removed.

Powers of the Court of Chancery,

and transmission of final order to Surrogate Court.

Appeals to the Court of Appeal.

31. Any person considering himself aggrieved by any order, sentence, judgment or decree of any Surrogate Court or being dissatisfied with the determination of the judge thereof in point of law in any matter or cause under this Act, may, within fifteen days next after such order, sentence, judgment, decree or determination, appeal therefrom to the Court of Appeal or to a single Judge of such Court, in the manner and subject to the regulations provided for by the Rules and Orders respecting the Surrogate Courts heretofore in force, or by Rules or Orders made under this Act; and the said Court of Appeal or Judge shall hear and determine such appeals; but no such appeal shall be had or lie unless the value of the goods, chattels, rights or credits to be affected by such order, sentence, judgment, decree or determination exceeds two hundred dollars; and in case of an appeal to a single judge, he may, in his discretion, and upon such terms as he thinks proper, refer the appeal to the said Court of Appeal.

Persons considering themselves aggrieved by any judgment &c. may appeal to the Court of Appeal.

Appeals not to lie in certain cases.

Right of Appeal:—Under the Court of Probate Act of Upper Canada (a) an appeal lay from judgments of the Surrogate Courts to the Court of Probate; upon that Court being abolished the appeal was to the Court of Chancery, and so continued until 40 Vic., c. 7; now it is to the Court of Appeals. Sec. 19 of the Court of Appeal Act includes appeals from the Surrogate Courts, as provided in the S. C. Act. As to appeal book, form of appeal bond, oath of justification, &c. see General Orders, Court of Appeal. See also S. C. Rules 50, 51, 52, *post*.

It would seem that, under this section, without reference to the *real estate*, however great its value, unless the *personal estate* of the testator or intestate exceed \$200, there is no appeal from the order or decree of the Surrogate Court, whether made in common form or in contentious proceedings.

PRACTICE.

Proofs to Lead Grant.

32. Unless otherwise provided by this Act, or by the Rules or Orders respecting Surrogate Courts heretofore in force, or hereafter to be made under this Act, the practice of the said several Surrogate Courts shall, so far as the circumstances of the case will admit, be according to the practice in Her Majesty's Court of Probate in England, as it stood on the fifth day of December, one thousand eight hundred and fifty-nine (b).

Practice of the
Courts, general
rule as to.

5 Decr, 1859.

General Rules and Orders for common form business were made under the Act; but contentious business, and indeed certain matters of common form business were left, and have since continued under the operation of this section, to be governed by the practice of the Court of Probate in England as it stood at the date mentioned in the section. *Vide ante*, p. 1.

Sec. 29 E. C. P. Act, corresponding with this section, has been held to apply to procedure only, not to the principles on which the Court acts. *Thos. Hy. Oliphant*, 1 Sw. & Tr., 525.

(a) *Vide ante*, p. 11.

(b) Date when Consolidated Statutes U. C. came into force.

33. On every application to a Surrogate Court for probate of will or letters of administration, where the testator or intestate was resident in Ontario at the time of his death, the place of abode of such testator or intestate at the time of his death shall be made to appear by affidavit of the person or some one of the persons applying for the same; and thereupon, and upon proof of the will, or in case of intestacy, upon proof that the deceased died intestate, probate of the will or letters of administration (as the case may be) may be granted under the seal of the Surrogate Court to which such application has been so made; and such probate or letters of administration shall have effect over the personal estate of the deceased in all parts of Ontario.

Proof, &c., requisite for obtaining grant of probate, or administration where deceased resided in Ontario.

Grant to have effect throughout Ontario.

As to "place of abode" *vide ante* s. 16 and note.

"Proof of the will," i. e., proof of its due execution according to the requirements of the "Wills Act of Ontario." The oath of the executor that he believes the paper of which he applies for probate, to contain the true last will and testament of the deceased, and the marking of the will by him, as required by Rule 16, may be regarded as adminicular proof of the will. *Vide post*, chapter on "proof of wills."

34. On every application for probate of a will or letters of administration where the testator or intestate had no fixed place of abode in, or resided out of Ontario at the time of his death, the same shall be made to appear by affidavit of the person or some one of the persons applying for such probate or administration, and that the deceased died leaving personal or real property within the county in the Surrogate Court of which such application is made, or leaving no personal or real property in Ontario, as the case may be, and that notice of the application has been published at least three times successively in the *Ontario Gazette*, and there-

Where testator, &c., had no fixed place of abode in, or resided out of Ontario, upon what proof probate or administration to be granted, &c.

upon, and upon proof of the will, or in case of intestacy, upon proof that the deceased died intestate, probate of the will or letters of administration, as the case may be, may be granted under the seal of such Surrogate Court; and such probate or letters of administration shall have effect over the personal estate of the deceased in all parts of Ontario.

Its effect.

“Fixed place of abode,” *vide ante* s. 16 and note.
For Form of Notice *vide* Appendix.

Affidavit
grounding
application for
grant to be
conclusive for
exercise of
jurisdiction
unless shown
to be incorrect.

(E. C. P. Act,
s. 57).

But the Judge
may stay pro-
ceedings in
case of incor-
rect state-
ment.

35. The affidavit as to the place of abode and personal property of a testator or intestate under the two next preceding sections, for the purpose of giving a particular Court jurisdiction, shall be conclusive for the purpose of authorizing the exercise of such jurisdiction; and no grant of probate or administration shall be liable to be recalled, revoked or otherwise impeached by reason that the testator or intestate had no fixed place of abode within the particular county at the time of his death, or had not personal or real estate therein at the time of his death; and every probate and administration granted by a Surrogate Court shall effectually discharge and protect all persons paying to or dealing with any executor or administrator thereunder, notwithstanding the want of or defect in such affidavit as is hereby required; but in case it is made to appear to the Judge of any Surrogate Court before whom any matter is pending under this Act, that the place of abode of the testator or intestate, or the situation of his property has not been correctly stated in the affidavit, such Judge may stay all further proceedings and make such order as to the costs of the proceedings before him as he thinks just.

Vide ante sec. 16, ss. 3.

Proof when Applicant not next of kin.

36. In case application is made for letters of administration by any person not entitled to the same as next of kin to the deceased, the next of kin or others having or pretending interest in the personal estate of the deceased resident in Ontario shall be cited or summoned to see the proceedings, and to show cause why the administration should not be granted to the person applying therefor; and if neither the next of kin nor any person of the kindred of the deceased happens to reside in Ontario, then a copy of such citation or summons shall be served or published in such manner as may be provided for by any Rules or Orders in that behalf.

When applicant for grant not next of kin to intestate the next of kin to be cited.

Citation will only issue upon a Judge's order (S. C. R. 17) and upon an affidavit in verification of the averments it contains being filed; *vide post* chapter on Citations.

As to service of citations under this sec. *vide* Rule 26, and as to service of citations in other cases *vide* Rule 25, as to citing heirs, devisees, &c., see sec. 49.

37. If the next of kin, usually residing in Ontario and regularly entitled to administer, happens to be absent from Ontario, the Surrogate Court having jurisdiction in the matter may, in its discretion, grant a temporary administration, and appoint the applicant, or such other person as the Court thinks fit, to be administrator of the personal estate of such deceased person for a limited time, or to be revoked upon the return of such next of kin as aforesaid.

Temporary administration in certain cases.

Limited.

See Rules 12, 13, as to limited grants, and chapter on "Limited Grants," *post*.

It will sometimes happen that the executor or the person entitled to administration is not immediately accessible, and the state of the assets may render it imperatively necessary to constitute a representative without delay. When such is

the case the Court will exercise the discretion conferred upon it by this section and s. 54. *post*.

Grant to
attorney.

In the case of persons resident out of Ontario, a grant will be made to their attorney acting under power of attorney, duly attested. The letter of attorney need not be under seal. A general power of attorney may, under some circumstances be sufficient though made without reference to the grant of administration (*Lucas v. Lucas*, 2 Lee, 557).

Where a person is authorized by a simple power of attorney to take out administration, the Court will decree to him such administration as it would have granted to the person who conferred the power, if he had applied for it himself. If administration be decreed in pursuance of a power, the grant must follow the terms of the power; and when the power is for a general grant, the Court cannot make a special grant (*Goldsborough*, deceased, 1 Sw. & Tr. 295) nor *è converso*, D. & B., 441.

The modern form of grant to an attorney is to ——— for the use and benefit of ——— resident at ——— and until he shall duly apply for and obtain probate or administration (*Cassidy*, deceased, 4 Hagg. 360).

Security to be
given.

38. The administrator so appointed shall give such security as the Court directs (a), and shall have all the rights and powers of a general administrator, and shall be subject to the immediate control of the Court.

Notice of Applications.

As to
transmission
of notice of
applications
for grants of
probates &c.,
to Surrogate
Clerk by
Registrar
(and see § 13).

39. In case of an application to any Surrogate Court for the grant of probate or administration, notice thereof shall, by the Registrar of the Court, by letter, post paid, be transmitted to the Surrogate Clerk by the next post after such application, and such notice shall specify the name and description or addition, if any, of the testator or intestate, the time of his death, and the place of his abode at his decease, as stated in the affidavit or affidavits made in support of such application, and the name of the

(a) See S. C. Rule 30.

person by whom the application has been made, and such other particulars as may be directed by any Rules or Orders in that behalf.

40. Unless upon special order or decree of such Surrogate Court; no probate or administration shall be granted in pursuance of such application, until such Registrar has received a certificate, under the hand of the Surrogate Clerk, that no other application appears to have been made in respect of the goods of the same deceased person, which certificate the said Surrogate Clerk shall forward, as soon as may be, to such Registrar.

Proceedings to be stayed till certificate received from Surrogate Clerk.

41. All notices in respect of applications in the several Surrogate Courts, shall be filed and kept by the said Surrogate Clerk.

Surrogate Clerk to file notices.

42. The Surrogate Clerk shall, with reference to every such notice, examine all notices of such applications received from the several other Surrogate Court Registrars, so far as appears to be necessary, to ascertain, whether or no, application for probate or administration in respect of the goods of the same deceased person has been made in more than one Surrogate Court, and he shall communicate with the Surrogate Court Registrars, as occasion may require, in relation to such applications.

And examine all notices &c.

43. In case it appears by the certificate of the Surrogate Clerk that application for probate or administration has been made to two or more Surrogate Courts, the Judges of such Courts, respectively, shall stay proceedings therein, leaving the parties to apply to one of the Judges of the Court of Chancery to give such direction in the matter, as to him seems necessary.

Proceedings if application has been made to more than one Surrogate Court.

To be decided in Chancery.

Judge in
Chancery to
determine
what court
shall have
jurisdiction.

44. On application made to such Judge of the Court of Chancery, he shall enquire into the matter in a summary way, and adjudge and determine what Surrogate Court has jurisdiction and shall proceed in the matter.

The Judge in
Chancery
shall deter-
mine as to
costs.

45. The Judge of the Court of Chancery may order costs to be paid by any of the applicants and the order shall be enforced by the Court of Chancery.

His decision
to be final.

46. The determination of such Judge shall be final and conclusive, and so soon as may be after such determination has been made, the Surrogate Clerk shall transmit a certified copy thereof to the Registrars of the several Surrogate Courts wherein such applications as aforesaid have been made.

Caveats.

As to caveats
where to be
lodged and
proceedings in
respect to.

47. Caveats against the grant of probate or administration (a) may be lodged with the Surrogate Clerk or with the Registrar of any Surrogate Court ; and subject to any rules or orders under this Act, the practice and procedure under such Caveats shall as nearly as may be correspond with the practice and procedure under Caveats in use on the fifth day of December, one thousand eight hundred and fifty-nine in Her Majesty's Court of Probate in England (b).

(E. C. P. Act,
s. 52.)

Sec. 53 of the E. C. P. Act provided that (subject to any rules or orders made under the Act) the practice and procedure under Caveats should as near as may be correspond with the practice and procedure then in use in the Prerogative Court of Canterbury.

(a) And also against the grant of letters of guardianship, see G. R. 4.

(b) See sec. 32 *ante*, and note ; also chapter on Contentious Business, *post*.

48. Immediately on a Caveat being lodged in any Surrogate Court, the Registrar of such Court shall send a copy thereof to the Surrogate Clerk to be entered among the Caveats lodged with him, and upon notice of application by the Registrar of a Surrogate Court under the thirty-ninth section being received, the Surrogate Clerk shall forward to such Registrar so soon as may be, notice of any Caveat that has been so lodged as aforesaid touching such application, and such notice shall accompany or be embodied with the certificate mentioned in the fortieth section.

To be transmitted to the proper Surrogate Courts.

Proof of Wills in Solemn Form.

49. Where proceedings are taken under this Act for proving a will in solemn form (a), or for revoking the probate of a will on the ground of the invalidity thereof, or where in any other contentious cause or matter under this Act the validity of a will is disputed, unless the will affects only personal estate, the heir or heirs at law, devisees or other persons having or pretending to have any interest in the real estate affected by the will, may, subject to the provisions of this Act and to the Rules and Orders relating to Surrogate Courts heretofore in force, or hereafter to be made under this Act, be cited to see proceedings, or be otherwise summoned in like manner as the next of kin, or others having or pretending interest in the personal estate (b) affected by a will should be cited or summoned, and may be permitted to become parties, subject to such Rules and Orders and to the discretion of the Court;

Where a will affecting real estate is proved in solemn form or is the subject of contentious proceedings, heirs, &c., may be cited, but not necessarily so, save on order of court.

(E. C. P. Act, s. 61.)

(a) Probate in solemn form is in the nature of a decree pronounced in open court. Coote, 4th ed. 250, and *vide* chapter on "Contentious business" *post*.

(b) *Vide ante* sec. 36 and note.

Proof of will
in solemn
form.

but nothing herein contained shall make it necessary to cite the heirs at law, or other person having or pretending interest in the real estate of a deceased person, unless the Court, with reference to the circumstances of the case directs the same to be done.

This section, except the last five lines, corresponds with section 61, E. C. P. Act, as to which, and two following sections of the Probate Act, it is said (a) that "One of their great objects is to prevent double trials; and this object where the wills relate to realty as well as personalty, can only be effected by citing the heir at law or other persons interested in such realty." The court, therefore, upon application made, will generally permit the citation to issue, and the fact of a co-heir being an infant or child of the plaintiff, is no ground for the court refusing to allow such co-heir to be cited (*Nicholls v. Binns*. 1 Swab. & Tris., p. 19. Jan., A.D. 1858).

Sec. 62 of the English Act provides that where a will is proved in solemn form or its validity declared in a contentious cause, the decree of the court shall inure to the benefit of all persons interested in the real estate, and that the probate shall be conclusive evidence of the validity and contents of such will in all suits or proceedings affecting real estate. The S. C. Act does not contain this provision.

(See note to sec. 4 *ante*, and chapter on Contentious business—*post.*) (b).

As to sec. 61 E. C. P. Act, Mr. Horsey says (p. 40) that, "this provision removes the scandal—that two courses of litigation on the same subject might be existing at the same time; the one in the Ecclesiastical Court impugning the will as to the personal estate, and the other litigation, either an ejectment at law by the heir or devisee, or an issue by the Court of Chancery at the instigation of the same parties, and these latter proceedings repeated several times. * * *

* * * It will in most cases be desirable to prove wills of realty in solemn form where any doubt exists as to the intentions of the heir or devisees under prior wills."

(a) *Coote's Prob. Prac.*, 5th ed. 244.

(b) See sec. 61 *et seq.* of Imp. Act, referred to in *Wilson v. Wilson*, 24 Gr., p. 394, (Proudfoot, V. C.)

"The advantage of proving a will in solemn form in the first instance is so obvious, that it is surprising that this course is not more frequently resorted to. Whenever the circumstances attending the execution of the instrument are calculated to create suspicion or inquiry, or when minors or persons of unsound mind have an interest adverse to the will, it is especially desirable to establish its validity while the witnesses are living and the facts recent. This is particularly the case when the will affects real estate, a sale of which may be in contemplation. (*Grove v. Bastard*, 2 Phill. 619, 1 DeG., M. & G. 12, S. C.) Of the decision of Lord Truro, Lord St. Leonards says *quære*, and considers this case (V. & P. 366, N. (h), 13th ed.) The expenses in an uncontested case are insignificant, for the evidence of one of the attesting witnesses is sufficient (*Belbin v. Skeats*, 1 Sw. & Tr. 148), and that may be given by affidavit (S. C. Act, 21.) The costs of the defendants, if unsuccessful, will generally be borne by themselves, in special cases only will they be paid out of the estate" (D. & B. 641, note a).

Advantage of proving will in solemn form.

In voluntary proceedings to prove a will in solemn form, a citation will issue to parties interested. *Vide post* —, 'Citations.

Copies of Wills.

50. An official copy of the whole or any part of a will, or an official certificate of the grant of any letters of administration, may be obtained from the Registrar of the Surrogate Court where the will has been proved or the administration granted, on payment of such fees as may be fixed for the same by the Rules and Orders heretofore in force or hereafter made under this Act.

Official copy of the whole or part of a will may be obtained.

(E. C. P. Act a. 69.)

Such certificates are required by Banks in which the testator or intestate had money or shares, before they will recognise the Executor or Administrator as the legal representative of the estate. Banks require also, in certain cases, a Declaration of Transmission to be deposited with the certificate. For Form of which *vide* Appendix.

Official certificate.

Administration Pendente Lite.

Administra-
tion *pendente*
lite may be
granted.

Rights and
powers of the
administrator.

(E. C. P. Act
s. 70 and 71.)

51. Pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling or revoking any probate or any grant of administration, the Court in which such suit is pending may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator other than the right of distributing the residue of such personal estate; and every such administrator shall be subject to the immediate control of the Court and act under its direction; and the Court may direct that such administrator shall receive out of the personal estate of the deceased such reasonable remuneration as the Court thinks fit.

See *Dey v. Dey*, 2 Gr. 149. And *vide post* ch. on “Administration *pendente lite*.”

Administration with will annexed.

Administra-
tion with the
will annexed.

Practice as to,
&c.

5th Dec., 1859.

52. Where administration is granted with the will annexed, a bond shall (unless it is otherwise provided by law) be given to the Judge of the Court as in other cases and with like effect, and unless otherwise provided for by this Act or the Rules or Orders relating to Surrogate Courts from time to time in force, the practice and procedure in respect to such administrations and in respect to such bonds and the assignment thereof shall, so far as the circumstances of the case will admit, be according to the practice in such cases in Her Majesty's Court of Probate in England, on the fifth day of December, one thousand eight hundred and fifty-nine (a).

(a) *Vide* sec. 32 *ante*.

53. In every case where any person applies to be appointed an administrator with the will annexed, and a bond is by law required to be given, he shall in his application state, and in his affidavit of the value of the property devolving shall depose to the value or probable value of all the real estate over which, or over any estate in which, the executor or executors named in the will or codicil were by the said will or codicil clothed with any power of disposition, or of all the real estate, which in case of no executor being appointed, was by the will or codicil directed to be disposed of, without any person being appointed to effect such disposition; and in every such case the bond to be given by such person upon his obtaining a grant of administration with the said will annexed, shall, as respects the amount of the penalty of the bond, and the justification of the sureties, include the amount of the value or probable value so stated and deposed to; and the condition of the bond, in addition to the other provisions thereof, shall provide that the administrator shall well and truly pay over and account for, to the person or persons entitled to the same, all moneys and assets to be received by him for or in consequence of the exercise by him of any power over real estate created by the will or codicil, and which may be exercised by him.

Applicant for administration with the will annexed.

To depose to value of real estate

directed to be disposed of.

The bond to include value of real estate.

Power as to Appointment of Administrator.

54. Where a person has died wholly intestate as to his personal estate, or leaving a will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor was at the time of the death of such person resident out of Ontario, and it appears to the Court to be necessary or convenient in any such case by reason of the insolvency

General power as to appointment of administrator under special circumstances. (E. C. P. Act, s. 73.)

of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased or of any part of such personal estate other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration to such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person to the person who, if this Act had not passed, would by law have been entitled to a grant thereof, but the Court in its discretion may appoint such person as the Court thinks fit, upon his giving such security (if any) as the Court directs, and every such administration may be as limited as the Court thinks fit.

Discretionary power of Court as to who shall be appointed.

Special circumstances.—*vide post*, Chapter on Administration.

The discretion intrusted to the Court by statute is not to be arbitrarily or capriciously exercised ; it is a legal discretion, governed by principle and sanctioned by practice (*Warwick v. Greville*, 1 Phillim. 123). Discretion is a science, not to act arbitrarily according to men's wills and private affections (*Rook's Case*, 5 Rep. 99).

After grant of administration, no person to act as executor. (E. C. P. Act, s. 75).

55. After any grant of administration no person shall have power to sue or prosecute any suit, or otherwise act as executor of the deceased as to the personal estate comprised in or affected by such grant of administration until such administration has been recalled or revoked.

Revocation of Temporary Grants.

Revocation of temporary grants of administration not to prejudice actions or suits. (E. C. P. Act, s. 76).

56. In case before the revocation of any temporary administration any proceedings at law or in equity have been commenced by or against any administrator so appointed, the Court in which such proceedings are pending may order that a suggestion be made upon the record of the revocation of such

administration, and of the grant of probate or administration which has been made consequent thereupon, and the proceedings shall be continued in the name of the new executor or administrator in like manner as if the proceedings had been originally commenced by or against such new executor or administrator, but subject to such conditions and variations, if any as such Court may direct.

Vide Revocation of Grants : post.

Validity of payments under Revoked Grants.

57. In case any probate or administration is revoked under this Act, all payments *bona fide* made to any executor or administrator under such probate or administration before the revocation thereof, shall be a legal discharge to the person making the same ; and the executor or administrator who has acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him which the person to whom probate or administration may be afterwards granted might have lawfully made.

Payments under probates or administration afterwards revoked to be valid.

(E. C. P. Act, s. 77.)

This section does not protect a payment made under an invalid will. An executor paid a legacy under a will which was afterwards declared to be invalid, and with the probate set aside by decree of the Court of Chancery. The representative of the estate was held entitled to recover back the money (*Haldan v. Beatty*, 40 Q. B. 110).

58. All persons and corporations making or permitting to be made any payment or transfer *bona fide* upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this Act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration.

Persons, &c., making payment upon probate granted, to be indemnified, &c.

(E. C. P. Act, s. 78.)

Executor Renouncing.

Right of executor renouncing probate to cease absolutely.

(E. C. P. Act, s. 79.)

59. Where any person renounces probate of the will of which he is appointed executor (or one of the executors), the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may without any further renunciation go, devolve and be committed in like manner as if such person had not been appointed executor.

By the construction of the corresponding section E. C. P. Act, a renunciation of probate operates in the sense of expunging the name of the renouncing executor from the will. (*Coote*, 8th Ed., p. 60, *cit*; *R. Noddings*, 9 W. R. 40).

An executor renouncing his right to probate, and the burthen of the execution of the will, thereby forfeits any bequest to him contained in the will (*Paton v. Hickson*, 25 Gr. 102). An executor cannot renounce if he have intermeddled (*Long v. Symes*, 3 Hagg, 771; *Badenach* deceased, 3 Sw. & Tr. 465.)

Parties named as executors proved the will, and upon a bill filed prayed *inter alia* to be relieved of the executorship. The Court under the circumstances refused to relieve them, they having deliberately accepted the office (*Hellem v. Severs*, 24 Gr. 320).

See further as to Renunciation, *post*.

Securities.

Repeal of certain provisions requiring sureties to administrator.

21 H. VIII, c. 5. 22-23 Car. II. C. 10, 1 Jas II. c. 17.

60. So much of the Act passed in the twenty-first year of King Henry the Eighth, and chaptered five (a), and of the Act passed in the twenty-second and twenty third years of King Charles the Second, and chaptered ten (b), and of the Act passed in the first year of King James the Second, and chaptered

(a) "An Act as to what fees ought to be taken for probate."

(b) "An Act for the better settling of intestate estates, and distribution of surplusages."

seventeen (a), as requires any surety, bond, or other security to be taken from a person to whom administration may be committed, shall not extend to or be in force in Ontario.

61. Except where otherwise provided by law, (E. C. P. Act, s. 81.) every person to whom any grant of administration is committed, shall give a bond to the Judge of the Surrogate Court from which such grant is made, to enure for the benefit of the Judge of such Court for the time being (or in case of the separation of counties, to enure for the benefit of any Judge of a Surrogate Court, to be named by the Court of Chancery for that purpose), with one or more surety or sureties as may be required by the Judge of such Surrogate Court, conditioned for the due collecting, getting in and administering the personal estate of the deceased, and the bond shall be in the form prescribed by the Rules and Orders now in force or hereafter made under this Act, and in cases not provided for by such Rules and Orders, such bond shall be in such form as the Judge of the Surrogate Court may by special order direct.

Persons receiving grants of administration to give bonds, &c.

As to the meaning of the words "surety" and "security," see Interpretation Act, R. S. O. p. 5. The form of bond prescribed by 23 Car. II., c. 10 (A.D. 1670), is, with some modifications, the form in use at the present day, as will be seen on comparison of the two forms. For Forms of bonds vide Chadwick on Administration Bonds.

62. Subject to the provisions of the fifty-third section of this Act, such bond shall be in a penalty of double the amount under which the personal estate and effects of the deceased have been sworn, unless the Judge in any case thinks fit to direct (as he may do) that the same shall be reduced, and the

Penalty in bonds, &c., and as to dividing liabilities of sureties.

(E. C. P. Act, s. 82.)

(a) "An Act making perpetual the last mentioned Act."

Judge may also direct that more bonds than one may be given, so as to limit the liability of any surety to such amount as the Judge thinks reasonable.

Power of Surrogate Courts as to assignment of bonds.

(E. C. P. Act, s. 83.)

63. The Judge of every Surrogate Court, on application made on motion or petition, in a summary way, and on being satisfied that the condition of any such bond has been broken, may order the Registrar of the Court to assign the same to some person to be named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond, in his own name, both at law and in equity, as if the same had been originally given to him instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount recoverable in respect of any breach of the condition of the said bond; and all bonds heretofore given or taken in any Surrogate Court, and now in force, may in like manner be assigned under the authority of the Judge of a Surrogate Court, and the assignee shall be entitled to sue and recover thereon in his own name, and the same may be enforced in the same way, and to the same extent as bonds given under this Act.

In regard to non-payment of debts being assignable as a breach of this bond, see cases quoted in *The Archbishop of Canterbury v. Robertson*, 3 Tyrwhitt, p. 390; and 1 Crompton & Meeson, p. 690.

An application for assignment of an administration bond should not be *ex-parte*; the sureties should be cited or served with notices. And it seems that the assignment is generally not ordered until after judgment at law or decree in equity is obtained against the administrator or his representative, in order to ascertain what amount the claimant is entitled to, and steps taken to compel payment by the principal before having recourse to the sureties (*Re Hiltz*, 1 Chy.

Ch. 386 ; *Younge v. Skelton*, 3 Hagg, 780). In an action of debt on an administration bond, by which administrator was to render his account by a certain day ;—plea, that administrator could not have rendered account at the time mentioned, there having been no sitting then ; held bad on demurrer, the breach being confessed but not avoided (*Earl of Elgin v. Crosby*, 10 U. C. Q. B. 97).

By 22 Vic. c. 16, s. , it was provided that “ the Court of Chancery may order all bonds taken in the Court of Probate on the grant of administration, and in force on the first of September, one thousand eight hundred and fifty-eight, to be assigned, and the same may be enforced in the name of the assignee, under the authority of the said Court of Chancery, in the same way as provided for in case of assignment of bonds in the Surrogate Court.”

It was held that the costs of an application under this provision for an assignment of a bond, in order to an action thereon at Common Law, could not be taxed as costs in the action, but should be recovered as damages consequent on the default. Letters of administration were granted by the Court of Probate, of the goods of C. Caswell, deceased, during the minority of his son, to the defendant Post. The usual bond was given by him and the other defendants. The Court of Chancery, on breach of the condition of the bond, ordered it to be assigned to plaintiff, who brought an action and recovered verdict for penalty and the damages assessed. On taxation of costs, plaintiff included in his bill the costs of the application to the Court of Chancery, which the Master disallowed. On appeal from Master, Draper C. J. held, “ that the costs of the application to the Court of Chancery could not be taxed as costs in this cause ; but that they might have been recovered as damages consequent on the default of defendant ” (*Closson v. Post*, 6 U. C. L. J., (1860), 141).

Estates of Small Value.

64. Where the whole estate and effects, real and personal, of any testator or intestate do not exceed in value the sum of two hundred dollars, his widow or any one or more of his children or next of kin, or his executors may apply to the Judge of the Surro-

Proceedings in
Surrogate
Court for ad-
ministration.

Registrar to
prepare pa-
pers.

gate Court within the County in which the testator or intestate had his fixed place of abode at the time of his death, and the Registrar of the said Court shall fill up the usual papers required by the Surrogate Court to lead to a grant of probate of the will of such testator or letters of administration of the estate and effects of the said testator or intestate, and shall swear the applicant and attest the execution of the administration bond according to the practice of the said Court, and shall then transmit a notice of the application by post to the Surrogate Clerk at Toronto; and the said Registrar on obtaining the approval or order of the said Judge of the Surrogate Court, shall in due course make out and seal the probate of the will of such testator, or letters of administration of the estate and effects of the said testator or intestate, to be delivered to the party so applying for the same without the payment of any fee for the same, save as is provided by the sixty-sixth section of this Act.

Proof of rela-
tionship.

65. The said Judge of the Surrogate Court may require such proof as he may think sufficient to establish the identity and relationship of the applicant; and if the said Judge has reason to believe that the whole estate and effects of which the testator or intestate died possessed exceed in value the said sum of two hundred dollars, he shall refuse to proceed with the application under the last preceding section until he is satisfied as to the real value thereof.

Judge to be
satisfied that
the value of
the estate less
than \$200.

Scale of fees.

66. Such fees as the Lieutenant-Governor in Council may think proper, shall be payable to the Judges and Registrars of the Surrogate Courts, on proceedings under the sixty-fourth and sixty-fifth sections, but the total amount for all proceedings and

services to be charged to applicants shall not in any one case exceed the sum of two dollars. See *Order in Council, Ontario Gazette, 6th March, 1875.* \$2.00.

Vide tariff post.

67. Any Rules and Orders requisite for carrying the said sections into effect, shall be framed, and may from time to time be altered by the judges appointed and authorized to make Rules and Orders, under the seventy-third and seventy-fourth sections of this Act. Rules and Orders.

Fees and Costs.

68. The fees mentioned in Schedule A to this Act, shall be payable to the Crown in stamps, subject to the provisions of "The Act respecting Law Stamps," on proceedings under this Act, and shall belong to and form part of the Consolidated Revenue Fund of this Province. As to fees payable to the Crown. Rev. Stat. c. 21.

69. The Judges of the several Surrogate Courts may demand, and take to their own use, the fees mentioned in the Schedule B to this Act, and such fees shall be collected by the Registrars of the said Courts, on or before each proceeding, and paid over to the said Judges, and annual returns of such fees, up to the thirty-first day of December, in each year, shall be made by such Registrars, on or before the first day of February in each year. As to fees to be taken by Judges, &c., to their own use.

70. The Registrars and Officers of the said Surrogate Courts, and Attorneys and Barristers respectively practising therein, shall be entitled to take, for the performance of duties and services under this Act, such fees as may be fixed under the provision hereinafter contained. Fees to officers.

Judges may
alter the
amount of fees
under 22 V.
c. 93, sec. 14.

No other fees
to be taken.

As to taxation
of costs.

(E. C. P. Act,
sec. 96.)

71. The table of fees fixed by the Judges appointed in pursuance of the fourteenth section of the "Surrogate Courts Act, 1858," to be taken by the Registrars and officers of the Surrogate Courts, and by Barristers and Attorneys practising therein in respect to business under that Act, and the fees to be payable in respect of searches, inspection and copies of and extracts from records, wills and other documents in the custody of or under the control of the said Surrogate Courts respectively, are hereby continued until altered under the authority of this Act; and no other fees than those specified and allowed in such tables or altered (a) of fees shall be taken or received by such Registrars, Officers, Barristers and Attorneys respectively.

72. The bill of any Attorney for any fees, charges or disbursements in respect of any business transacted in a Surrogate Court, whether contentious or otherwise, or any matter connected therewith, shall as well between Attorney and Client as between party and party, be subject to taxation in such Surrogate Court, and the mode in which such bill shall be referred for taxation, and the person by whom the costs of taxation shall be paid, shall be regulated by the Rules and Orders heretofore in force or hereafter made under this Act, and the certificate of the Registrar of the amount at which such bill is taxed shall be subject to appeal to the Judge of the Court.

Taxing Bills of Costs.—Any bill of costs may be referred to the Registrar for taxation, and no special order is required for the purpose.

The bill of costs of any proctor, solicitor or attorney will be taxed on his application, after sufficient notice given to the person or persons liable for the payment thereof, or on

(a) The word "tables" apparently omitted from the Rev. Stat.

the application of such person or persons, after sufficient notice given to the practitioner, and the Registrar shall decide in each case what may be a sufficient notice.

When an appointment has been made by a Registrar to tax a bill, the Registrar may proceed to tax the same after the expiration of a quarter of an hour, notwithstanding the absence of either party, or his agent, provided he be satisfied that the absent party has had due notice of the appointment for taxation.

If more than one-sixth is deducted from any bill of costs taxed as between practitioner and client, no costs incurred in the taxation thereof will be allowed as part of such bill (a).

Costs in Contentious Suits.—The rules now in force as to County Court costs in contentious business appear in the reported case of *re tariff*. O——, a Solicitor, 7 Prac. Rep. 80, and 24 Gr. 529, which was an appeal from the ruling of the Master, finding that the appellant was entitled to tax County Court costs only. The appellant was engaged by the respondent to conduct proceedings on his behalf in a contentious matter in the Surrogate Court. The order made in the matter directed the costs to be paid out of the estate. Upon a reference to the Master to have the appellant's bill of costs taxed it was pointed out that the tariff of fees was expressed to be applicable to non-contentious matters only, and it was argued that there being no fixed tariff for contentious matters the costs ought to be allowed according to the table of fees in the Court of Probate in England. The Master, however, allowed only County Court costs.

After argument of the appeal, before Proudfoot, V.C., the attention of the learned Vice-Chancellor was called to the fact that on the 31st August, 1858, the Judges appointed to frame rules and forms had promulgated certain rules, amongst which was the following:—

“The fees to be taken by attorneys and barristers respectively practising in the Surrogate Courts in respect to business under the said Act, or under any Act of the Parliament of Upper Canada, or of this Province, giving powers or jurisdiction to the said Courts, or the Judges thereof, shall be the same, as nearly as the case will allow, as are now payable in suits and proceedings in the County Court. These, it is to be understood, are only temporary provisions, until a full

(a) *Vide* Horsey's Probate Acts, 1857-8.

body of rules and forms can be settled and printed for distribution."

These rules were not to be found in the printed book of rules and forms issued under the authority of the Judges, and the Vice-Chancellor held that no full body of rules had been settled, inasmuch as no provision was subsequently made for the fixing of the scale of costs in contentious matters; and that the rule above referred to is still in force; and the appeal was dismissed with costs.

Chancery
tariff.

It had previously been held by Blake, V.C., in *Re Harris, Harris v. Harris*, 24 Gr. 459, that where, in a contentious cause removed from a Surrogate Court to the Court of Chancery, the decree gave costs of all proceedings, the party to receive the costs was entitled to have them taxed under the Chancery tariff.

On the 29th November, 1858, the Surrogate Court rules were settled, being the only body of rules made under the Act, except the rules as to guardians, of 29th Sep., 1858, and the temporary rules above mentioned.

Costs out of
estate.

Costs out of Estate.—Where costs were directed to be paid out of the estate by the Prerogative Court, the proper mode of taxation was by a more liberal test than between party and party, but still not to so wide an extent as between proctor and client (*Edwards v. Unwin*, 2 Curt. 641) (a).

Rules or Orders Regulating Procedure.

Existing rules
and orders
continued.
22 V. c. 93.

73. The general Rules and Orders made by the Judges appointed in pursuance of the fourteenth section of the Surrogate Courts Act, 1858, are hereby continued; and until an appointment is made by the Lieutenant-Governor under the authority of the next section, the said Judges shall continue and possess the same powers as before this Act takes effect, and may, from time to time, repeal, amend, add to, or alter any existing General Rules and Orders as to them seems fit, and may exercise the powers in the next succeeding section, and in the seventy-first section of this Act mentioned.

(a) See further as to costs in Contentious Business, *post*.

74. The Lieutenant-Governor, at any time after this Act takes effect, may appoint one of the Judges of the Court of Appeal, one of the Judges of the Superior Courts of Common Law, one of the Judges of the Court of Chancery, and one County Court Judge, in Ontario with power to the said Judges, or any two of them, from time to time, to make other Rules and Orders :

Rules and orders for regulating the procedure of the Courts.

(1) For regulating the procedure and practice of the said Surrogate Courts, and in relation to their jurisdiction and proceedings under this Act ;

(2) For regulating the duties of the Surrogate Clerk, the duties of the several Surrogate Court Registrars, and other officers of such Courts ;

(3) For determining what shall be deemed contentious, and what non-contentious business ;

(4) (Subject to the express provisions of this Act) for regulating the manner of appealing from the decisions of the said Surrogate Courts ; and

(5) Generally for carrying the provisions of this Act into full and beneficial effect.

75. The powers conferred by the seventy-third and seventy-fourth sections of this Act shall extend and apply to the making, from time to time, of Rules and Orders for regulating, simplifying and expediting proceedings in the Surrogate Courts, and fixing and regulating the fees to be taken as aforesaid, under the provisions of this Act or any other Act, giving powers or jurisdiction to the said Surrogate Courts or to the Judges thereof.

Procedure in other matters of jurisdiction to be regulated by rules made under this Act

Effect of Past Probates and Grants.

As to effect of grants of probate or administration before 1st Sept., 1858.

76. Legal grants of probate and administration made before the first day of September, one thousand eight hundred and fifty-eight, and grants of probate and administration heretofore made legal, shall have the same force and effect as if they had been granted under this Act.

Limited grants in case *bona notabilia* not within the jurisdiction of Court by which grant made prior to 1 Sept., 1858.

77. In case any probate or administration had been granted before the first day of September, one thousand eight hundred and fifty-eight, and the deceased had personal estate in Upper Canada not within the limits of the jurisdiction of the Court, by which such probate or administration was granted, or otherwise not within the operation of the grant, the Court to which under this Act, an original application for probate or administration might be made, may grant probate or administration only in respect of such personal estate not covered by any former probate or administration, and the grant shall be limited accordingly.

Papers to be placed in Court of Chancery.

Wills, papers, &c. of former Court of Probate to remain deposited in Court of Chancery. 22 V. c. 93, s. 55.

78. All books, records, wills, grants, probates, letters of administration, administration bonds, notes of administration, Court books, deeds, processes, acts, proceedings, writs, documents and every other instrument, relating exclusively or principally to matters and causes testamentary, deposited in the Court of Chancery, by the Judge of the Court of Probate, the Registrar thereof, and every other person who had the custody of books, documents and papers, of or belonging to that Court, pursuant to the fifty-fifth section of the Surrogate Courts Act, 1858, shall remain so deposited, so as to be easy of

reference under the control and direction of the Court.

These papers are in the office of the Surrogate Clerk under the control of the Court of Chancery. See *ante* sec. 8.

SCHEDULE A.

(Section 68.)

Fees payable to the Crown.

ON PROCEEDINGS IN THE OFFICES OF REGISTRARS.

	\$	cts.
On every application for probate or administration or for guardianship, (including notice thereof to Surrogate Clerk, but not postage).....	0	50
On certificate of Surrogate Clerk upon such application (including transmission to Registrar, but not postage).....	0	50
On every instrument or process with Seal of Court...	0	50
Entry and notification of Caveat (not including postage).....	0	50
On every Grant of Probate or Administration, as follows, viz:		
Where the property devolving is under \$1,000	0	50
For every additional \$1,000.....	0	50
On every final judgment in contentious or disputed cases.....	1	00
On deposit of wills for safe custody, each.....	0	50

ON PROCEEDINGS IN THE OFFICE OF SURROGATE CLERK.

On every search for grant of probate, administration guardianship, or other matter in clerk's office (other than searches on application of registrars).....	0	50
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	\$	cts.
On every certificate of search or extract.....	1	00
(If exceeding three folios, 10 cents per folio.)		
On every other certificate issued by the Surrogate Clerk.....	0	50
On every order made on application to a Judge in Chancery and transmission of same, exclusive of postage.....	0	80
On entry of every appeal.....	1	00
On every decree on appeal and transmission, exclusive of postage.....	3	00
On entry of Caveat.....	0	50
On every decree or order on appeal.....	2	50

SCHEDULE B.

(Section 69.)

Fees allowed to Judge.

On every grant of probate or administration:		
Where the property devolving is under \$1,200...	2	00
Where the property devolving is from \$1,200 to \$3,000.....	3	00
Where the property devolving is from \$3,000 to \$4,000.....	4	00
And so for every additional \$1,000, the additional sum of.....	1	00
On every appointment of a guardian.....	2	00
On every order.....	0	50
On every special attendance, or attendance for purpose of audit.....	1	00
For every day's sittings in contentious or disputed cases	2	00
On evidence, if taken before Judge (per folio).....	0	20

 For tables of fees to be taken by Registrars, Sheriffs, and Attorneys, see tables A. and B. to S. C. Rules *post*.

For the purpose of ascertaining the amount of fees or Probate fees, stamp duty payable to the Crown under sec. 68, the scale given in the Schedules to the Act is applied to the amount of *property devolving*, in respect of which probate or administration is to be granted, as deposed to in the affidavit of value (Form 10 S. C. Rules), and the following general principles and decisions are taken into consideration :—

1. The property, to be liable to probate duty, must, at the time of the owner's death, be capable of being received or recovered by his executor or administrator *virtute officii*, and independently of any special direction. In other words it must either be in itself of a personal character, as goods, chattels, or credits of the deceased, or it must have had that character absolutely impressed upon it by some act of the deceased in his life-time. (Hanson on Probate Duty 2nd ed. p. 3 ; and D. & B. 564 *et seq.*) The purchase money of real estate which the testator has contracted to sell is liable to probate duty as soon as it is received by his executors (*Atty-Gen. v. Brunning*, 8 H. L. cas. 243) ; and so are the proceeds of sale of any real estate, which form part of the assets of a partnership firm, although real estate acquired by partners for the purposes of their business may be dealt with by them in such way as to prevent this result, as where, *e. gr.* they procure it to be conveyed to them in equal undivided shares (*Custance v. Bradshaw*, 4 Hare, 315).

2. Probate duty is not payable in respect of property over which the testator had a mere power of appointment (*Platt v. Routh*, 6 Mee. & W. 756, affirmed in *Drake v. Atty-Gen.* 10 Cl. & Fin. 257).

3. The property must be locally situate, or capable of being dealt with within this country (*Atty-Gen. v. Dimond*, 1 Cr. & Jerv 356.) and therefore probate duty is not payable on stocks in the public funds of the United States (*Atty-Gen. v. Hope*, Cl. & F. 530). But it is payable on bonds of a foreign government, which pass by delivery, and are consequently capable of being dealt with in this country (*Atty-Gen. v. Bouwens*, 4 Mee. & W. 171), and on Canadian ships (*vide ante*, p. 25).

Partnership Effects.—For the purpose of taking out probate and paying fees thereon, the representative of a deceased partner in a mercantile firm must be taken to be interested in the corpus of the partnership effects to the extent of the share of the deceased, undiminished by the debts and liabilities.

ties of the firm (*Re Surrogate Court of Wentworth, and Kerr*, 44 Q. B. 207).

Imp. Stata., 55 Geo. III, c. 184, and 22 & 23 Vict., c. 36, giving duties to the Crown on Probates, Letters of Administration, and Inventories, do not extend to this Province. Attention is directed to this, because many of the English decisions as to such duties depend almost entirely on those Statutes.

AN ACT
RESPECTING
GUARDIANS OF INFANTS.

REVISED STATUTES OF ONTARIO, CAP. 132.

Appointment by Surrogate Courts.

1. Where any infants have not a father living, or any legal guardian authorized by law to take the care of their persons, and the charge of their estates (a), the Surrogate Court for the County within which any such infants reside may appoint guardians of such infants; and letters of guardianship granted by a Surrogate Court shall have force and effect in all parts Ontario; and an official certificate of the grant may be obtained as in the case of letters of administration; and a return of every appointment and removal of a guardian shall be made by Registrars respectively to the Surrogate Clerk in like manner as is required by "The Surrogate Courts Act," in the case of grants of probate or administration; but this section shall not be construed as depriving the Court of Chancery of jurisdiction in such matters.

To what Court the right of appointing guardians shall belong.

Rev. Stat. c. 46.

Ecclesiastical law discriminated between infants and minors. An infant being a child under seven years of age, and from seven to twenty-one a minor. A minor is entitled to elect his own guardian, while the guardian of an infant is appointed by the Court. The choice of minors has no great

Infants and minors.

(a) See Preamble of 8 Geo. IV. c. 6, as to reason and intention of the Act. And see *ante*, p. 23.

weight, where the eldest of them is not fourteen, if he were near that age it would be otherwise. The Court may judge of the fitness of the person chosen by a minor for his guardian, and may refuse the grant to an improper person. In the case of an infant, the Judge *ex officio* elects the guardian; the child has no voice in the matter (D. & B. 443).

The Surrogate Courts Act does not exclude the jurisdiction of the Court of Chancery in respect to the appointment of guardians, *Re Stannard*, 1 Chy. Chamb. 15. At the same time that Court discourages applications to it in the first instance, which could be made to the Surrogate Court.

Father entitled to custody, &c.

The father is the natural guardian, and, by the Common Law, entitled to the custody of his legitimate children, even to the exclusion of the mother, although they be within the age of nurture, and he is entitled also to have them brought up in, and taught the tenets of, the church to which he belongs, if he desire it (*The King v. Greenhill*, 6 N. & M. 244; *Re Leigh*, 5 Prac. R. 402; *Re Carnwell*, 6 Prac. R. 241; *Re Ross*, 6 Prac. R. 285; *D'Alton v. D'Alton*, L. R., 4 P. & D. 87; *Re Hakewill*, 12 C. B. 223-231).

But the Court of Chancery, under certain circumstances, exercising the controlling power of the Crown as *parens patriæ*, did, and does now exercise the power of removing children from the custody and care of the father (a).

Testamentary guardians.

A wife obtained from that Court an order giving her the custody of her infant daughter, until she had attained the age of twelve years. *Held*, that this did not prevent the father appointing testamentary guardians of the infant (*Davis v. McCaffry*, 21 Gr. 554).

A contested suit in the Surrogate Court of the County of Perth resulted in an order appointing the stepfather of an infant of ten years to be its guardian. It appeared that evidence had been adduced in the Surrogate Court to the effect *inter alia* that such an appointment was in accordance with the expressed wish of the mother in her last illness, and that the child herself, who had lived some time with her uncle, preferred to live with her stepfather; that she had got on very well with her uncle until he got married, but that his wife was "awful cross," and she would rather live with her stepfather. On appeal, the Court of Chancery

(a) *Story Eq. Jur.*, 12 ed., §§ 1328, 1341, and cases cited; *MacPherson on Infants*, p. 101, *et seq.*; and *Simpson's Law of Infants*, Lond., 1875, p. 136, *et seq.*

being satisfied, from the whole evidence, that it was for the real and permanent good of the child, reversed the order of the Surrogate Court in favour of the uncle. In *Re Irwin*, 16 Gr. 461.

The father of the infants died intestate, and his widow obtained letters of administration, who, by her will, appointed her sister, a married woman, sole guardian of her two infant daughters. After her death, the paternal grandfather of the infants applied to the Judge of the Surrogate Court, to be appointed their guardian, who, in opposition to objections made by the sister, did appoint him their guardian :—

Held, on appeal from the Judge of the Surrogate Court of the County of Simcoe: (1) That although the Court of Chancery has jurisdiction to appoint guardians to infants, notwithstanding the enactment of the Surrogate Act, it will not do so on an appeal like this; (2) That the fact of the person named as guardian in the will of the deceased mother of the children, being a married woman, was itself sufficient to prevent the Court appointing her (*Re McQueen, McQueen v. McMillan*, 23 Gr. 191) (a).

It is not the practice of the Court to give weight to the objection that a person sought to be appointed guardian to an infant is the next of kin to whom the lands of the infant would descend (*Ib*).

A guardian appointed by a Surrogate Court obtained an order of the Court of Chancery for the delivery of the person of the infant into her custody, *Re Gillrie*, 3 Gr., 279 (b).

2. Upon the written application of any such infant, or the friend or friends of such infant, residing within the jurisdiction of the Surrogate Court to which application is made, and after proof of twenty days' public notice of the application and of notice thereof to the mother of such infant, or that such infant has no mother living in Ontario, the

When Judges of Surrogate Courts may appoint guardians.

20 days notice:

(a) See also *Holly v. Chamberlain*, 1 Redfield (N. Y.), 333, and *Swartwout v. Swartwout*, 2 Redfield, 52.

(b) See further as to the custody of infant children: In *Re Kinney*, 6 P. R. 245; In *Re Allen, Reg. v. Allen*, 31 Q. B. 458 & 5 P. R. 443; and *Munro v. Munro*, 15 Chy. 431. And as to the custody of illegitimate children, see *Holshed*, 5 P. R. 251; and in *Re the Queen v. Armstrong*, 1 P. R. 6; and *Leggo Chy. Prac.* p. 1875.

Judge of such Court may appoint some suitable and discreet person or persons to be guardian or guardians of such infant.

Grants for use and benefit of infants. Where an infant is sole executor, administration with the will annexed is granted to his guardian, or to such person as the Court may think fit, until he attains the full age of twenty-one years. And if a person entitled to administration be under age, administration during his minority may be granted in like manner, (*vide post*, 'Chapter on Grants for the use and benefit, *jus habentium*').

Such guardians to give security by bond. **3.** The Judge shall take from the guardian or guardians so appointed a bond in the name of the infant, in such penal sum, and with such securities as the Judge directs and approves, having regard to the circumstances of the case, and such bond shall be conditioned that the said guardian or guardians will faithfully perform the said trust; and that he or they, the said guardian or guardians, or his or their respective executors or administrators, will, when the said ward becomes of the full age of twenty-one years, or whenever the said guardianship is determined, or sooner if thereto required by the said Surrogate Court, render to his or their said ward, or to his or her executors or administrators, a true and just account of all goods, moneys, interest, rents, profits or property of such ward, which come into the hands of such guardian or guardians, and will thereupon, without delay, deliver and pay over to the said ward, or to his or her executors, or administrators, the property or the sum or balance of money which may be in the hands of the said guardian or guardians belonging to such ward, deducting therefrom and retaining a reasonable sum for the expenses and charges of the said guardian or guardians, and such bond shall be recorded by the Registrar of the Court in the books of his office.

Condition of bond.

Account.

Pay over balance.

Expenses of guardian.

Bond to be recorded.

Authority of Guardians.

4. The guardian or guardians of any infant so appointed, during the continuance of his or their guardianship:—

(1.) Shall have authority to act for and in behalf of the said ward;

Guardian's authority.

To act for ward.

(2.) May appear in any Court and prosecute or defend any action in his or her name;

To appear in actions at law.

(3.) Shall have the charge and management of his or her estate, real and personal, and the care of his or her person and education;

To manage real and personal estate, &c.

(4.) And in case the infant is under the age of fourteen years, may, with the approbation of two of Her Majesty's Justices of the Peace, and the consent of such ward; or in case the infant is not under the age of fourteen years, then with the consent of the ward only, may place and bind him or her an apprentice to any lawful trade, profession or employment; such apprenticeship in case of males not extending beyond the age of twenty-one years, and in case of females, not beyond the age of eighteen years, or the marriage of the ward within that age.

To apprentice infant or minor.

Males until 21.

Females until 18, or marriage.

The guardian of infants cannot give a lease of their estate; such lease is void *ab initio*, unless the sanction of the Court of Chancery has been obtained thereto. *Switzer v. McMillan*, 23 Gr. 538. By the Chancery Act, s. 76, that Court has jurisdiction to order a sale, lease, or other disposition of real estate of an infant where necessary for the maintenance or education of the infant, or if the property is exposed to waste or dilapidation his interest requires or will be substantially promoted by such disposition, which is to be made under the direction of the Court or one of its officers, or by the guardian of the infant, or by any person appointed by the Court for the purpose, in such manner, and with such restrictions as to the Court may seem expedient, and may order the infant to con-

Authority of guardians.

vey the estate as the Court thinks proper (*Re Baker*, 6 Prac. R. 225).

But no sale, lease or other disposition shall be made against the provisions of any will or conveyance by which the estate has been devised or granted to the infant, or for his use (sec. 77).

Infant's consent if 14 years of age.

The application to the Court shall be in the name of the infant by his next friend, or by his guardian, but shall not be made without the consent of the infant, if he is of the age of fourteen years or upwards (*Ib*).

A guardian appointed by a Surrogate Court may bring ejectment to try the infant's title (*Robinson C. J.*), *Doe d Atkinson v. McLeod*, 8 Q. B. 344.

Apprenticing.—See R. S. O., c. 135, respecting “Apprentices and Minors”; and for Form of Deed of Custody of child in cases of adoption. *Vide App. of Forms*.

Removal of Guardians.

How guardians may be removed.

5. The Surrogate Judge by whom any guardian or guardians have been appointed under this Act may, upon reasonable complaint made and sustained, or cause shown to his satisfaction, remove such guardian or guardians from his or their said guardianship, and if it be judged necessary, may appoint another guardian or guardians of the said infant.

The Court of Chancery has, by R. S. O. c. 40, s. 84, power to remove testamentary guardians. *Vide post*.

Powers and Practice of Surrogate Courts in matters of Guardianship.

In matters of guardianship courts to have same powers for examination of witnesses and in enforcing decrees, &c., as in testamentary matters.

6. In all matters and applications touching or relating to the appointment, control or removal of guardians of any such infants, and the security to be given by such guardians, and otherwise, the several Surrogate Courts shall have the like powers, jurisdiction and authority for the examination of witnesses, the production of deeds and writings, and generally for the enforcing of all orders, decrees and

judgments made or given by such Surrogate Courts, in respect to the appointment, control and removal of guardians as aforesaid, as are given to them by "The Surrogate Courts Act," in matters testamentary; and such orders, decrees and judgments may be appealed from to the Court of Appeal, or to a Judge thereof, in the manner provided in said Act for appeals to such Court or Judge in matters testamentary.

7. The practice and procedure under the preceding sections of this Act shall, except where otherwise provided for by Rules or Orders under "The Surrogate Courts Act," conform, as nearly as the circumstances of the case will admit, to the practice and procedure prescribed by the said Act, and all the powers given by the several sections of that Act, to the Judges appointed or to be appointed, as contained in the seventy-third and seventy-fourth sections of said Act, may from time to time be exercised by them, for the purpose of simplifying and expediting the proceedings, and for fixing and regulating the fees to be taken by officers, and by attorneys and counsel respectively, for business and proceedings done and taken under this Act in the several Surrogate Courts.

Removal of Testamentary Guardians and Trustees.

8. Testamentary guardians and trustees shall be removable by the Court of Chancery, for the same causes as other guardians and trustees.

Testamentary Guardians.—Although the Court of Chancery is in the habit of respecting the wishes and directions of a testator in reference to the guardianship and care of his children, it will not do so where it is clearly shown that a compliance therewith would be prejudicial to the happiness and moral training of the infants. Anon: 6 Gr. 632.

The disposition by will and testament of the custody and

tuition of any child by virtue of 12 Car. II, c. 24, is within the provisions of the Wills Act, sec. 9.

Power of
Court of
Chancery.

The Court of Chancery in Ontario has the like jurisdiction and powers in all matters relating to infants and their estates, as were on 4th March, 1837, possessed by the Court of Chancery in England (R. S. O. c. 40, s. 34). It also has jurisdiction respecting the custody of infants, in the cases, and subject to the provisions mentioned in "The Act respecting the Custody of Infants" (s. 75).

Appointment of the Mother as Guardian in certain cases.

Appointment
of mother as
guardian to
minor.
notwithstanding
other
appointment
by father.

9. Any of the Superior Courts of Law or Equity, or any Judge of any of the said Courts, or a Judge of the Surrogate Court upon hearing the petition of the mother of a minor, whose father is dead, may appoint her to be guardian of the person of the minor, notwithstanding any testamentary provision to the contrary by the father, or any appointment of another person, as guardian, by the father, if such appointment of the mother appears to the Court or Judge to be just and proper; and

Maintenance.

such Court or Judge may also make an order for the maintenance of the minor, by payment out of any estate to which the minor is entitled, of such sum or sums of money, from time to time, as according to the value of the estate, such Court or Judge thinks just and reasonable (a).

Vide Supra note to sec. 1 and sec. 10 *post*.

Courts may
give effect to
testamentary
appointment
of a guardian
by the mother.

10. Any of the said Courts shall have power to give effect to a testamentary appointment of a guardian of the person of her infant children, made by the mother of such children, upon petition of the guardian so appointed, notwithstanding a previous testamentary appointment by the father of such

(a) See *In Re Eves*, 15 Gr. 580.

infants, wherever, owing to a change of circumstances or other cause, it may seem to such Court advisable in the interests of such infants so to do, and the Court may make an order for the maintenance of the infants as in the last preceding section mentioned. Maintenance.

11. The Court or Judge, as aforesaid, may enforce the attendance of any person before such Court or Judge, to testify on oath respecting the matter of such petition, by order or rule made for that purpose, and on the service of a copy thereof, and the payment of expenses as a witness, in the same manner as in a suit or action in the said Courts respectively, or may receive affidavits respecting the matters in such petition. Court or Judge in any such case may compel the attendance of witnesses.

12. All orders made by the Court or a Judge by virtue of this Act, shall be enforceable by process of contempt by the Court or Judge, by which or by whom such order has been made. Orders enforceable by process of contempt.

13. Nothing herein contained shall be construed to change the law as to the authority of the father in respect of the religious faith in which a child is to be educated. Authority of father, religious faith.

[See also sections 2, 3, 4, 5, 6, 16, 17 and 27 of Rev. Stat. c. 135.]

Religious Faith.—*Vide* note to section 1, *ante*. See also S. C. Rules (*post*) as to appointment of Guardians.

PART II.

THE SURROGATE COURTS, ONTARIO.

COMMON FORM BUSINESS.

RULES, Nov. 29TH, 1858.

[NOTE.—These Rules and Orders, with the Forms referred to in them are set forth *verbatim* in the order in which they have hitherto been published in pamphlet form, as practitioners being accustomed to them in that order, can more readily refer to them than if placed in the chapters upon various subjects treated of, the references to sections of the Act changed to correspond with the R. S. O., and side notes being added for convenience of reference.]

The Judges appointed under the fourteenth section of "The Surrogate Courts Act, 1858," do, in pursuance of the powers conferred by the said Act, order and direct that the rules, orders, and directions hereinafter set forth shall henceforth be the

Temporary Orders.

The Judges appointed under the fourteenth section of "The Surrogate Courts Act, 1858," on the 31st of August of that year, made the following temporary orders :—

"(1) The forms now in use in the Surrogate Courts shall be used
"by the Registrars of the said Courts as guides for framing forms
"under the said Act ;

"(2) The fees now payable to Registrars and Officers of the said
"Surrogate Courts may be demanded and received by Registrars and
"Officers of the Courts in respect to proceedings under the said Act
"in addition to the fees for which they are to account under the said
"Act ;

"(3) The fees to be taken by Attorneys and Barristers respectively,
"practising in the said Surrogate Courts, in respect to business under
"the said Act, or under any Act of Parliament of Upper Canada, or
"of this Province, giving powers or jurisdiction to the said Courts,

General Rules and Orders in non-contentious business:—

For regulating the procedure and practice of Surrogate Courts;

For regulating the duties of the several Surrogate Court Registrars, and the duties of the Surrogate Clerk; and

For fixing the fees to be taken by the Registrars *vide* sec. 73 & 74, S. C. Act. and other Officers of the said Courts, and by Attorneys practising therein; and, also,

In relation to the provisions of the said Act.

Procedure.

1. Non-contentious business shall include all common form business as defined by the Act (a), and the warning of caveats. Non-contentious business.

2. Application for probate or administration may be made through a solicitor or attorney (b), or in person. Application through solicitor, &c.

“ or to the Judges thereof, shall be the same as nearly as the nature of the case will allow, as are now payable on suits and proceedings in the County Courts;

“(4) The practice on appeals from the Surrogate Courts to the Court of Chancery shall be in accordance, *mutatis mutandis*, with the practice hitherto prevailing upon appeals from the Surrogate Courts to the Court of Probate.

“ These, it is to be understood, are only temporary provisions, until a full body of rules and forms can be settled and printed for distribution,” (L. J. U. C., 1858, pp. 247, 249). *Vide* re O ———, a Solicitor *ante*.

(a) See sec. 2, sub-sec. 4, Surrogate Court Act.

(b) It would seem to be immaterial whether the practitioner be styled Solicitor, or Attorney. In the Prerogative Court he was styled “Proctor;” in the Surrogate Court Act, “Attorney;” and see sec. 70. Application by letter, or by an agent, is not permissible according to the practice of the Eng. Court of Probate. See D. & B. 1064.

7 days to
elapse after
death before
probate.

3. No probate or letters of administration, with the will annexed, shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the Judge.

If desired the will and affidavits may be filed, although the letters will not issue until seven days have elapsed.

14 days before
administration

4. No administration shall issue, until after the lapse of fourteen days from the death of the deceased, unless under the direction of the Judge.

Application
to be by
petition.

5. Every application to a Surrogate Court for grant of probate or administration must be by petition, signed by the applicant or his attorney (a). The subjoined forms, numbered 1, 2, 3, and 4, are to be followed as nearly as the circumstances of the case will admit.

When affida-
vits to lead
grant may
be taken.

6. The necessary affidavits to lead grant, and the usual oath of executors and administrators may be taken at the time the application for grant is signed, or afterwards at any time before the application is submitted to the Judge for his order and direction.

Application
may be
amended.

7. If there should appear to be any material variance between the application and affidavits made in support thereof, the Judge may direct such application to be amended according to the fact, and a new notice on such amended application to be sent to the Surrogate Clerk.

Execution of
will to be
sworn to.

8. Where there are one or more subscribing witnesses to a will or codicil, the due execution of such will or codicil shall be sworn to by any one of such witnesses, or the absence of such witnesses accounted for; in which last case such will or codicil must be

(a) A personal representative can only be appointed on petition (*Re Lee & Waterhouse*, 5 U. C. L. J., 1859, 256).

established by other proof, to the satisfaction of the Judge (a).

9. The oath of administrators, and of administrators with the will annexed, is to be so worded as to clear off all persons having a prior right to the grant. In these cases the grant should shew on the face of it how the prior interests have been cleared off.

Oath of administrator.
Prior interest to be cleared off.

10. The usual oath of administration, as well as that of executors and administrators with the will, is to be reduced into writing, and to be subscribed and sworn by them as an affidavit.

Oath to be in writing.

11. Under the statute the several Surrogate Courts have power to appoint an administrator other than the person who, prior to the Act, would have been entitled to the grant (sec. 38).^{*} Whenever the Court sees fit to exercise such a power, the fact should be made plainly to appear in the oath of the administrator, in the letters of administration, and in the administration bond.

Special grants under sec. 54, S. C. Act.
^{*}Sec. 54.

12. Where limited administrations are applied for, it must be made to appear that every person entitled in distribution to the personal estate, has consented, or renounced, or has been cited and failed to appear, except when the Judge sees fit otherwise specially to direct.

Limited administrations.

13. No person entitled to a grant of administration of the personal estate and effects of the deceased generally, shall be permitted to take a limited grant,

14. In administrations of a special character, the recitals in the oath and in the letters of administration.

Recitals, special administrations.

(a) *Vide* Will Act, sec. 12, and chapter on Proof of Wills, *post*.

tion, must be framed in accordance with the facts of the case.

Grants to
guardians of
infants.

15. Grants of administration may be made to the guardians of infants and minors, for the use and benefit of such infants and minors during their minority, and elections by minors of their next of kin, or next friend, as the case may be, to such guardianship, shall be required.

Elections.

Marking will
when executor
sworn.

16. Every will, or copy of a will, to which an executor or administrator with the will is sworn, should be marked by such executor or administrator, and by the person before whom he is sworn.

Citation to
issue on order
of Judge.

17. In all cases where it is necessary to issue a citation to accept or refuse probate of a will, or to accept or refuse letters of administration, or where it is necessary to issue a subpoena to bring in a testamentary paper, and in all similar cases, the order of the Judge must be taken, and such citation, subpoena, or other instrument issued by the Registrar, in accordance with the direction of the Judge.

Caveats.
Interest of
caveator must
appear.

18. The party entering a caveat must declare therein the nature of his interest in the goods of the deceased, and the grounds upon which he enters such caveat, and the same shall be signed by the party, or by his attorney or solicitor, on his behalf, and the place mentioned as the address of the party entering the caveat; and no caveat shall have any force or effect unless the requirements of this rule be in substance complied with.

Duration of
caveat three
months.

19. A caveat shall remain in force for the space of three months' only, and then expire and be of no effect; but caveats may be renewed from time to time as heretofore.

20. No caveat shall affect any grant made on the day on which the caveat is entered, unless notice of such caveat has been received prior to the grant passing the seal. Notice, &c., prior to grant.

21. A caveat shall be warned at the place mentioned in it as the address of the person who entered it. Where warned.

22. It shall be sufficient for the warning of a caveat, that the Registrar of the Court in which application for grant is made, send by public post a warning signed by himself, bearing the seal of the Court, and directed to the person who entered it, or to his attorney, if signed by attorney, at the address mentioned in it. Warning sent by post.

23. Any person intending to oppose a grant of probate or administration, for which application has been made to a Surrogate Court, must appear, either personally or by attorney, and enter an appearance in such Court, in which appearance the address of the party, or of his attorney, shall be given. This rule is to apply, whether the person intending to oppose the grant has, or has not, been previously warned to a caveat, or served with a citation. Appearance.

24. When a party intending to oppose a grant, has filed an appearance with the Registrar, no further steps in respect of such grant shall be taken, except under the special direction of the Judge. After appearance, direction of Judge.

25. Citations against all persons in general, and other instruments heretofore required to be served, by affixing them in some public place, are in future to be served by the insertion of the same as advertisements in such newspapers, local, British, or foreign, as the Judge may from time to time direct. Citation by advertisement

Such citations can only be allowed to issue in cases where there is an affidavit to lead them.

And on Judge's order *ante*, Rule 17, as to publication of notices in *Ontario Gazette* (See R. S. O. c. 18). As to cases in which service was formerly effected by affixing papers in public places, *Vide* chapter on citations *post*.

Newspapers in which inserted.

*Sec. 36, S. C. Act, R. S. O.

26. Citations under the 27th* section of the Act may be served by inserting the same as advertisements in such one of the *Toronto* morning papers, and such other papers, local, British or foreign, as the Judge of the Court may by special order direct.

Form of bond.

27. The bond to be given upon any grant of administration shall be according to the forms 16 and 17 subjoined, or in a form as near thereto as the circumstances of the case admit.

Sureties to justify.

28. The sureties in such bond are required in all cases to justify.

Under £50 one surety.

29. In ordinary cases, where property is *bona fide* under the value of fifty pounds, one surety only may be taken to the administration bond.

Sureties, special administration.

30. In all cases of limited or special administration, two sureties are always to be required to the administration bond, and the bond is to be given in double the amount of the fund to be dealt with under the administration.

In estates where the penalty of the bond would be large, the applicant sometimes finds less difficulty in procuring sureties if the obligation can be divided among a larger number; and in practice the Court does not limit the number to two, so that they justify in a sufficient amount. See sec. 38, 61, 62 S. C. Act.

Notices to Surrogate Clerk.

31. Whenever any renunciation is filed subsequent to notice of application to the Surrogate Clerk, or

any alteration is subsequently made in the grant; notice of such renunciation or alteration is to be immediately forwarded by the Registrar of the Court to the Surrogate Clerk.

32. The addition and true place of abode of every person making an affidavit shall be inserted therein. Addition and abode of deponent.

33. In every affidavit made by two or more persons, the names of the several persons making it are to be written in the jurat. Names in jurat.

34. Where an affidavit is made by any person who is blind, or who, from his or her signature, or otherwise, appears to be illiterate, the Registrar or Commissioner before whom such affidavit is made, is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same; and also that the said party made his or her mark, or wrote his or her signature, in the presence of the Registrar or Commissioner before whom the same was taken. Affidavit by blind or illiterate person.

35. No affidavit should be admitted in any matter depending in the Surrogate Court, in the jurat of which there is any interlineation or erasure. Interlineations in jurat.

36. No affidavit is to be admitted which has been sworn before the party on whose behalf the same is offered, or before his attorney, or before the clerk or partner of such attorney. Affidavit not to be sworn before attorney, &c.

Registrars.

37. Every Registrar of a Surrogate Court, being also Clerk of the County Court, shall keep his office open on such days and during such hours as the office of the Clerk of the County Court is required Registrar's office hours.

to be kept open ; and every Registrar who is not the Clerk of the County Court shall keep his office at the county town, and shall keep the same open during such hours as the Judge shall prescribe.

To keep books. **38.** Every Registrar of a Surrogate Court shall keep books as nearly as may be in the manner shewn in the Forms, numbered 35, 36, 37, 38, and 39, set forth below.

To endorse and file papers **39.** Every Registrar shall duly endorse and file, all papers received by him, and enter a note thereof, and of every proceeding in the Court in the books to be kept.

May prepare application. **40.** When it is desired by an applicant for grant of probate or administration, the Registrar of the Court in which application is to be made may prepare the form of application, and all other forms necessary in non-contentious business, without the intervention of a solicitor or attorney.

Applications to be numbered. **41.** All applications for the grant of probate or administration received by a Registrar, shall be numbered in the order in which they are received, and be endorsed thus:—"Received and filed the _____ day of _____, 18—, _____, Registrar of said Court." And an entry thereof shall be made in the book to be kept for that purpose, with a number prefixed to correspond with the number on the application to which such entry relates.

Notices to Surrogate Clerks. **42.** Notices of applications to be transmitted to "The Surrogate Clerk," under the 28th* section of the Act, are to contain the Christian and surname residence, and addition of the deceased, the time of his death, Christian and surname, residence and

* 39th S. C. Act.

addition of applicant, nature of application, Court in which made. Forms 5, 6, 7, and 8, are subjoined, to be varied according to the circumstances.

43. All papers and communications from Registrars to the Surrogate Clerk shall be transmitted through the post office, the letter or packet to be registered and prepaid, and addressed thus :

Papers, how transmitted to Surrogate Clerk.

<p style="text-align: center;">THE SURROGATE CLERK, TORONTO.</p> <p>From the Surrogate Court, County of _____.</p>
--

44. Every Registrar, upon receipt of a certificate from the Surrogate Clerk touching an application made to the Court of which he is Registrar, shall forthwith enter a note thereof in the book to be kept for that purpose ; and shall, as soon as may be thereafter, lay such application, and all papers in relation to the same, before the Judge, for his order and direction thereupon.

Registrar to make entry of certificate received from Surrogate Clerk, and lay before Judge.

45. Every order made by the Judge upon or in reference to any application, shall be noted by the Registrar in the books to be kept for that purpose.

Judge's order to be noted by Registrar.

46. When the Judge makes an order for the grant of probate or administration, the Registrar shall record such grant in the "Register Book," and in case of the grant of probate or letters of administration with the will annexed, an exact copy of the will, and codicil, if any, to which such probate or administration relates, shall be under-written. If a

Grants to be recorded in "Register Book," with exact copy of will.

grant be afterwards revoked, a note of such revocation shall be entered across the record of grant in the "Register Book."

Grants to be signed and sealed.

47. All probates and letters of administration shall be signed by the Registrar, and sealed with the seal of the Court from which they are issued, and the copy of will and codicil, if any, annexed to a probate or to letters of administration, shall be authenticated by the signature of the Registrar.

List of grants to be sent to Surrogate Clerk. What to contain.

* 13th section S. C. Act.

48. The list of grants of probates and administration, and of revocation thereof, required under the thirtieth* section of the Act, to be sent by Registrars to the Surrogate Clerk, are to contain in each case the Christian and surname, residence and addition of the deceased, the time of his death, date of the grant, name, residence and addition of executor or administrator, nature of grant, and in what Surrogate Court.

Registrars' duties as to caveats lodged

49. Every Registrar of a Surrogate Court shall number, endorse, and enter all caveats lodged with him in the same manner as provided in respect to applications for grants; and notice thereof, in the form No. 33, shall be sent to the Surrogate Clerk by the next post after such caveat has been lodged.

Appeals to the Court of Chancery (a).

* 31st section S. C. Act.

50. Appeals under the twentieth* section of the Act shall be subject to the following regulations:

Bond in case of appeal.

In case any person desires to appeal from any order, sentence, judgment, or decree of a Surrogate Court, or from the determination of the Judge thereof on any point of law—

(a) The Appeal is now to the Court of Appeal; *Vide* Sec. 31, S. C. A. and note.

I. He (or in case of his absence, some one on his behalf,) shall, with two sufficient sureties, execute a bond to the respondent in the sum of two hundred dollars, to the effect, that the appellant will effectually prosecute his appeal, and pay such costs, charges, and expenses as shall be awarded in case the order (or decree, *as the case may be*,) shall be affirmed or in part affirmed.

II. The sureties to such bond shall make affidavit *Sureties.* as to their sufficiency.

III. An affidavit of the execution of the said bond shall be made by the subscribing witness thereto. *Affidavit of execution.*

IV. An affidavit shall be made by the appellant, his attorney or agent, that the goods, chattels, rights, or credits, to be affected by such order (or decree, *as the case may be*,) are over the value of two hundred dollars. *Affidavit—that subject of appeal over \$200.00.*

Vide sec. 31, S. C. Act.

V. The said bond and affidavits shall be filed with the Registrar of the Surrogate Court. *Filed with Registrar.*

VI. A notice of such appeal shall be served by the appellant on the opposite party, his attorney or agent. *Notice of appeal to be served.*

If such bond and affidavits be made and filed, and such notice be served within fifteen days next after the order, sentence, judgment, decree, or determination appealed against, the appeal shall be held by such Surrogate Court to be duly lodged. *Fifteen days for lodging appeal.*

51. When an appeal is so lodged, the Judge of the Surrogate Court shall, on the application of the appellant, order all proceedings in the matter to be stayed. *Appeal lodged; proceedings to be stayed.*

Papers advanced to be transmitted on appeal.

* Court of Appeal.

52. Upon certificate from the Registrar of the Court of Chancery,* that the petition of appeal has been filed in his office, the Judge of the Surrogate Court shall, upon the application of the appellant, order the Registrar of the Court forthwith to transmit (at the expense of the appellant) to the Registrar of the Court of Chancery* the documents, instruments, affidavits, and papers, in the matter as appealed, deposited or filed in such Surrogate Court.

Removal of Causes.

And on removal to Chancery.

* 29th.

53. When a cause or proceeding is removed into the Court of Chancery, under the twenty-second* section of the Act, the Judge of the Surrogate Court shall, upon the application of the party who has obtained the order for removal, in like manner as mentioned in Rule 52, direct the papers in the matter to be transmitted to the Registrar of the Court of Chancery.

The Surrogate Clerk.

Office hours—
Surrogate Clerk.

54. The Surrogate Clerk shall keep an office at such place as the Judges of the Court of Chancery may direct, and such office shall be kept open daily, except on the appointed holidays of the Court, for and during such hours as the Judges of the Court of Chancery shall prescribe.

Duties.

55. Every office day the Surrogate Clerk shall procure from the Toronto Post Office such letters and communications as may have been mailed and addressed to him as the Surrogate Clerk.

To keep books.

56. The Surrogate Clerk shall keep books as nearly as may be in the manner shewn in the forms

numbered 41, 42 and 43, set forth below, and which books he shall keep duly indexed from time to time.

57. All notices of application to any Surrogate Court for the grant of probate or administration received by the Surrogate Clerk, shall be numbered in the order in which they are received, and be endorsed thus—"Received and filed the —— day of ——, 18——, Surrogate Clerk;" and an entry thereof shall be made in the book to be kept for that purpose, with a number prefixed to correspond with the number on the notice of application to which such entry relates; and all caveats and copies of caveats lodged with and received by the Surrogate Clerk, shall in like manner be numbered, endorsed, and the entry thereof be made in the book to be kept for that purpose.

Numbering,
endorsing and
entering no-
tices and
caveats.

58. The Surrogate Clerk, upon receiving a notice of application for probate or administration, if seven days in case of testacy, and fourteen days in cases of intestacy, have elapsed after the death of the deceased (as shown in the notice) shall forthwith make the necessary search and examination in the books required to be kept by him, and amongst the original papers on file in his office; and on the next office day after the receipt of such notice shall mail a certificate as to such search, according to the form numbered 40, or as near thereto as the circumstances of the case will admit. If at the time of receiving a notice of application the periods aforesaid shall not have expired, the Surrogate Clerk shall not make such search and examination, nor shall such certificate be sent until the eighth day after the death of the testator, and the fifteenth day after the death of the intestate, according to the time of the de-

Duties on
receiving
notice of
application.

cease, as shown in the notice of application for probate or administration.

Noting grants
and revoca-
tions.

* 13th sec.
S. C. Act.

Lists, &c.
received by
Surrogate
Clerk
to be filed,
&c.

59. The Surrogate Clerk shall extract from the lists furnished to him under the 30th* section of the Act, the particulars of each grant, and shall enter a note of the same, placing it in its alphabetical order under the first letter of the surname of the testator or intestate, in the book to be kept by him for that purpose, and shall also note in such book every revocation of a probate or administration notified to him; and all lists, copies of wills, returns of revocations, and papers received by the Surrogate Clerk, shall be filed and endorsed in like manner as is provided in respect to notices of application for grants.

When to
certify special
matters.

Names *idem*
sonans.

60. If it shall appear from the entries required to be kept by the Surrogate Clerk, or from inspection of the original papers on file in his office, that the name of the deceased person, as given in any application for probate or administration, although not identical in the mode of spelling, yet it is, or appears to be, *idem sonans* with the name of the testator or intestate, as given in any other application, or in any lists of grants on file, or if on such examination or inspection it shall for any cause appear doubtful whether another application or an actual grant has not been made in the goods of the same deceased person, the Surrogate Clerk shall certify the special matter as disclosed in such search and inspection by him.

Communica-
tions by
registered
letter.

61. All communications from the Surrogate Clerk to Registrars of Surrogate Courts shall be by registered letter, addressed thus :

<p>THE REGISTRAR OF THE SURROGATE COURT OF</p> <p>THE COUNTY OF <i>(as the case may be),</i></p> <p><i>(Insert Post Office Address.)</i></p> <p>From the Surrogate Clerk.</p>

62. The Surrogate Clerk shall attend the meetings of the Judges appointed under the 14th (a) section of the Act, and shall perform such duties, as their Clerk, as may be required of him. Surrogate Clerk to attend meetings of Judges.

Fees.

63. Registrars and other Officers of Surrogate Courts shall be entitled to take and receive to their own use, the fees set forth in the tables of fees subjoined, marked A, for the performance of duties and services under the Act in non-contentious cases. Fees of officers.

64. The fees payable to the fee fund, and to the Judge and Registrar, on business and proceedings in the Surrogate Courts, as well as postage, when necessary, shall be paid to the Registrar in the first instance, by the party on whose behalf such proceeding is to be had, on or before such proceeding. By whom paid.

65. Attorneys practising in the said Courts shall be entitled to take for the performance of business and services under the Act, in non-contentious cases, the fees set forth in the subjoined table, marked B. Fees of attorneys.

Forms.

66. The subjoined forms, numbered 1 to 39, in- Forms.

(a) Secs. 73, 74, S. C. Act. R. S. O.

clusive, are to be adopted and followed in the several Surrogate Courts, as nearly as the circumstances of each case will allow.

Construction. **67.** In the construction of these Rules, the provisions contained in the 67th section (a) of the Act shall apply.

ROBERT E. BURNS, J.
J. G. SPRAGGE, V.C.
JAS. R. GOWAN, Co. J.

Toronto, 29th November, 1858.

(a) *i.e.* the interpretation clause, sec. 2, S. C. Act., R. S. O.

FORMS.

1. *Application for Probate in common form by a Sole Executor.*

UNTO THE SURROGATE COURT OF THE COUNTY (OR UNITED COUNTIES) OF _____.

The petition of A.B., of the _____ of _____, in the County of _____, Esq.

Humbly sheweth :

That C. D., late of the _____ of _____, in the County of _____, *surgeon*, deceased, died on or about the _____ day of _____, A.D. 18—, at _____, in, &c., and that the said deceased at the time of *his* death, had *his* fixed place of abode at _____, in the said County of _____ [*or* “had no fixed place of abode in Ontario,” (*or* “resided out of Ontario,”) “but had at such time personal” (*or* “real”) “estate in the said County of _____”]. That the said deceased in *his* life time duly made *his* last will and testament, bearing date the _____ day of _____, 18— [and codicil (*or* codicils) bearing date the _____ day of _____, A.D. 18—]. That your petitioner is the executor named in the said will (*or* codicil). That the value of the personal estate and effects of the said deceased, which *he* in any way died possessed of or entitled to, and for and in respect to which a probate of the said will (and codicil) is to be granted, are of or about the value of _____ dollars, to the best of your petitioner’s knowledge and belief. Wherefore your petitioner

prays that probate of the said will (and codicil) of the said deceased may be granted to *him* by this honourable Court.

Dated the — day of —, 18—.

A. B.,

Or if signed by Attorney of applicant,

A. B.,

By *his* Attorney E. F., one, &c.

2. Application for Grant of Administration with the Will annexed, in common form, where no Executors appointed.

UNTO THE SURROGATE COURT OF THE COUNTY (OR UNITED COUNTIES) OF —.

The petition of A. B., of the — of —, in the County of —, Esquire,

Humbly sheweth :

That C. D., late of —, in the County of —, *spinster*, deceased, died on or about the — day of —, A.D. 18—, at —, in, &c., and that the said deceased at the time of *her* death, had *her* fixed place of abode at —, in the said County of —, [*or* “had no fixed place of abode in Ontario,” (*or* “resided out of Ontario,”) “but had at such time personal” (*or* “real”) “estate in the said County of —,”] that the said deceased in *her* life time duly made *her* last will and testament, bearing date the — day of —, A.D. 18—, [and codicil (*or* codicils) bearing date the — day of —, 18—].

That no executor is named in the said will (*or* codicil). That your petitioner is the residuary legatee (*or as the case may be*) named in the said will (*or* codicil). That the value of the personal estate and effects of the said deceased, which *she* in any way died possessed of, or entitled to, and for and in respect to

which a probate of the said will (and codicil) is to be granted, are of or about the value of ——— dollars, to the best of your petitioner's knowledge, information, and belief.

Wherefore your petitioner prays that administration with the said will (and codicil) annexed, of the personal estate and effects of the said deceased may be granted and committed to him by this honourable Court.

Dated the ——— day of ———, A.D. 18—.

A. B.,

Or if signed by Attorney of applicant,

A. B.,

By *his* Attorney, E. F., one, &c.

3. *Application for Grant (in common form) where Executor or Residuary Legatee has renounced Probate or Administration with Will annexed.*

UNTO THE SURROGATE COURT OF THE COUNTY (OR UNITED COUNTRIES OF ———).

The petition of A. B., of the ——— of ———, in the County of ———, Esquire,

Humbly sheweth,

That C. D., late of the ——— of ———, in the County of ———, *surgeon*, deceased, died on or about the ——— day of ———, A.D. 18—, at ———, in &c., and that the said deceased at the time of *his* death, had *his* fixed place of abode at ———, in the County of ———, [or "had no fixed place of abode in Ontario," (or "resided out of Ontario," "but had at such time personal" (or "real") "estate in the said County of ———].] That the said deceased in *his* lifetime duly made *his* last will and testament, bearing date the ——— day of ———,

A. D. 18—, [and codicil (*or* codicils) bearing date the — day of —, A. D. 18—].

That E. F., of —, the executor (*or* residuary legatee, &c.) named in the said will, has by *deed* hereunto annexed, duly renounced all right and title to [the probate and execution of the said will (and codicil, *if any*,) *or* letters of administration to the personal estate and effects of deceased].

That your petitioner is (*state relationship to deceased*.) That the value of the whole property devolving under the said will (and codicil) is under — dollars, and that the personal estate and effects of the said deceased, which *he* in any way died possessed of or entitled to, and for and in respect to which a probate of the said will (and codicil) is to be granted, are of or about the value of — dollars, to the best of your petitioner's knowledge, information and belief.

Wherefore your petitioner prays that administration with the said will (and codicil) of the said deceased annexed may be granted to him by this honourable Court.

Dated the — day of —, A. D. 18—.

A. B.,

Or if signed by Attorney of applicant,

A. B.,

By *his* Attorney, G. H., one, &c.

—

4. Application for Grant of Administration.

UNTO THE SURROGATE COURT OF THE COUNTY (OR UNITED COUNTIES) OF —.

The petition of A. B., of the — of —, in the County of —, *spinster*.

Humbly sheweth:

That C. D., late of the — of —, in the County of —, *merchant*, deceased, died on or about the — day of —, A. D. 18—, at —, in, &c., and that the said deceased at the time of his death, had *his* fixed place of abode at —, in the said County of —, [*or* “had no fixed place of abode in Ontario” (*or* “resided out of Ontario”), “but had at such time personal” (*or* “real”) “estate in the said County of —.” That the said deceased died a bachelor, without parent, brother, or sister, uncle or aunt, nephew or niece (*to be varied according to the circumstances of the case*), and without having left any will, codicil, or testamentary paper whatever, and that your petitioner is the lawful cousin-german and next of kin of the said deceased (*to be varied according to the circumstances of the case*).

That the personal estate and effects of the said deceased, which *he* in any way died possessed of or entitled to, and for and in respect to which letters of administration are requested to be granted, are of or about the value of — dollars, to the best of your petitioner's knowledge, information and belief.

Wherefore your petitioner prays that administration of the personal estates and effects of the said deceased may be granted and committed to *her* by this honourable Court.

Dated this — day of —, 18—.

A. B.,

Or if signed by Attorney of Applicant,

A. B.,

By *her* Attorney, E. F., one, &c.

Where the application is for administration under the 54th section of the Act, the special circumstances which bring the case within that section should be set forth in the petition, and also upon oath (S. C. Rules 11, 14).

5. *Notice to be transmitted by Registrar of a Surrogate Court to the Surrogate Clerk, of application made to such Court for a Grant of Probate to Sole Executor.*

THE SURROGATE COURT OF THE COUNTY OF _____.

To the Surrogate Clerk :

Take notice, that application has been made to the Surrogate Court of the County of _____, for a grant of probate of the will bearing date the _____ day of _____, A.D. 18—, [and codicil (or codicils) bearing date the _____ day of _____, A.D. 18—, of _____, late of _____, in the County of _____, deceased, *surgeon*, who died on or about the _____ day of _____, A.D. 18—, having at the time of *his* death, a fixed place of abode at _____, in the said county of _____ [or “no fixed place of abode in Ontario,” (or “resided out of Ontario”), “but having at such time personal” (or “real”) “estate in the said County of _____”], by A. B. of _____, in the County of _____, _____, the executor (or by J. P., the Attorney of A. B., the executor) named in the said will (or codicil).

Application received the _____ day
of _____ 18—. }
This notice mailed the _____ day
of _____ 18—. }

_____,
Registrar of the said Court.

6. *Notice to be transmitted by Registrar of a Surrogate Court to the Surrogate Clerk, of application for Grant of Administration with the Will annexed, where no Executor appointed.*

THE SURROGATE COURT OF THE COUNTY OF _____.

To the Surrogate Clerk :

Take notice, that application has been made to the Surrogate

Court of the County of ———, for a grant of letters of administration with the will annexed, the said will bearing date the — day of ———, A.D. 18— [and the said codicil (or codicils), bearing date the — day of ———, 18—,] of ———, late of ———, in the County of ———, ———, deceased, who died on or about the — day of ———, A.D. 18—, having at the time of his death, a fixed place of abode at ———, in the said County of ———, [or “no fixed place of abode in Ontario,” (or “resided out of Ontario”), “but having at such time personal” (or “real”) “estate in the said County of ———”], by A. B., of the ——— of ———, in the County of ———, ———, the residuary legatee (or as the case may be) named in the said will (or codicil,) (or by J. P., the Attorney of A. B., the residuary legatee named in said will or codicil) —no executor having been named in the said will or codicil.

Application received the — day
of ———, 18—.
This notice mailed the — day
of ———, 18.

Registrar of the said Court.

7. *Notices to be transmitted by Registrar of a Surrogate Court to the Surrogate Clerk, of application for Grant where Executor or Residuary Legatee has renounced Probate or Administration with Will annexed.*

THE SURROGATE COURT OF THE COUNTY OF ———.

To the Surrogate Clerk:

Take notice that application has been made to the Surrogate Court of the County of ———, for a grant of letters of administration with the will annexed, the said will bearing date the — day of ———, A.D., 18— [and the said codicil (or codicils) bearing date the — day of ———, A.D., 18—], of ———, late of ——— in the County of ———, ———, deceased, who

died on or about the — day —, A. D., 18—, having at the time of his death, a fixed place of abode at —, in the said County of — [or “no fixed place of abode in Ontario,” (or “resided out of Ontario,” but having at such time personal (or “real”) “estate in the said County of —”], by A. B., of the — of — in the County of —, —, the residuary legatee (or *as the case may be*) named in the said will (or codicil) (or by J. P., the Attorney of A. B., the residuary legatee named in the said will or codicil), E. F. of the — of —, in the County of —, —, the executor (or “residuary” legatee,” &c.) named in the said will, having renounced all right to the probate and executorship of the said will and codicil (if any) or to letters of administration to the personal estate and effects of the said deceased.

Application received the — day
of —, 18—.
This notice mailed the — day
of —, 18—.

_____,
Registrar of the said Court.

8. *Notice of Application for grant of Administration.*

THE SURROGATE COURT OF THE COUNTY OF —

To the Surrogate Clerk :

Take notice that application has been made to the Surrogate Court of the County of —, for a grant of letters of administration of the personal estates and effects of —, late of the — of —, in the County of —, deceased, who died intestate on or about the — day of —, A. D. 18—, having at the time of his death a fixed place of abode at — in the said County of —, [or “no fixed place of abode in Ontario,” (or “resided out of Ontario”), “but having at such time personal” (or “real”) estate in the County of —,”] and who died without child or parent, brother or sister, uncle

or aunt, nephew or niece, *him* surviving, by A. B., of the — of —, in the County of —, —, one of the lawful cousins-german and next of kin of the deceased (or by J.P., the Attorney of A. B., one of the, &c.).

Application received the — day
of —, 18—.
This notice mailed the — day
of —, 18—.

_____,
Registrar of the said Court.

9. *Affidavit of Time of Death, and place of abode of Testator or Intestate.*

IN THE SURROGATE COURT, COUNTY OF—.

In the goods of W. A., deceased.

I, A. B., of the — of —, in the County of — — —, make oath and say, that I am [one of the executors (*or* the executor) named in the last will and testament (*or* codicil) of the said W. A., deceased, (*or* the party applying for administration of the will and codicil, (if any) annexed, or administration of the personal estate and effects of the said W. A., deceased)]. That said deceased died on or about the — day of —, A. D. 18—, at —, and that the said deceased, at the time of *his* death, had *his* fixed place of abode at —, in the said County of —, [*or* “had no fixed place of abode in Ontario,” (*or* “resided out of Ontario,”) “but had at such time personal” (*or* “real”) estate, “in the said County of —”] (*a*).

Sworn at — in the County of }
—, the — day of —, A.D. }
18—, before me, A. B.

Person authorized to administer oaths under the Act.

(*a*.) See as to modifying this form “in other cases.” provided for in the amendment,—Sec. 16, s. s. 3, S. C. Act.

10. *Affidavits of Value of Property devolving, and of Personal Estate and Effects.*

IN THE SURROGATE COURT, COUNTY OF _____.

In the goods of W. A., deceased.

I, A. B., of the — of —, in the County of —, make oath and say, that I am [one of the executors (or the executor) named in the last will and testament (or codicil) of the said W. A., deceased (or the party applying for administration, with the will and codicil, if any), annexed, or administration of the personal estate and effects of the said W. A., deceased].

That the personal estate and effects of the said deceased, which *he* in any way died possessed of or entitled to, and for and in respect to which ("probate of the said will is," or "letters of administration are"), to be granted, are of or about the value of — dollars.

Sworn at — in the County of }
 —, the — day of —, A.D. }
 18—, before me, }



A. B.

(Person authorized to administer oaths under the Act.)

11. *Affidavit for search for Will.*

IN THE SURROGATE COURT, COUNTY OF _____.

In the goods of J. T., deceased.

I, A. B., of the — of —, in the County of —, make oath and say, that I am the party applying for administration of the personal estate and effects of the said J. T., late of —, in the County —, deceased. That I made diligent and careful search in all places where the deceased usually kept his papers, and in his depositories, in order to ascertain whether the deceased had or had not left any will; but that I

have been unable to discover any will, codicil, or testamentary paper, and I verily believe that the deceased died without having left any will, codicil, or testamentary paper whatsoever.

Sworn at ———, in the County of }
 ———, the ——— day of ——— }
 A.D. 18—, before me, } A. B.

(Person authorized to administer oaths under the Act.)

12. Affidavit of Execution of Will by Subscribing Witness (a).

IN THE SURROGATE COURT OF THE COUNTY OF _____.

In the goods of A. B., deceased.

I, C. D., ———, of the Township of ———, in the County of ———, make oath and say, that I knew A. B., late of ———, deceased; that on or about the ——— day of ———, in the year of our Lord one thousand eight hundred and ———, I was present, and did see the said A. B., ———, sign and declare the paper-writing hereunto annexed as, and for, the last will and testament of the said A. B.; that I, deponent [and E. F., of, &c., *(if there be a second subscribing witness)*] did subscribe my name as witness [*or our names as witnesses*] to the execution of the said will, at the request of the said testator, and in presence of each other (*or as the case may be*); and lastly, that the name (*or several names*) subscribing as witnesses to the execution of the said will are of the proper handwriting of this deponent (and the said E. F., respectively).

Sworn before me at _____, }
 this _____ day of _____, }
 A D. 18—. } C. D.

(Person authorized to administer oaths under this Act.)

(s) i.e., of a will made prior to 1st January, 1874. For other form, vide
 802.

13. *Oath of Executor.*

IN THE SURROGATE COURT OF THE COUNTY OF ———.

In the goods of ———, deceased.

I, ———, of the ——— of ———, in the County of ———, ———, make oath and say, that I believe this paper-writing [or these paper-writings] hereto prefixed, to contain the true and original last will and testament of ———, late of the ——— of ———, in the County of ———, ———; that I am the sole executor [or one of the executors] therein named [or executor according to the tenor thereof—executor during life—executrix during widowhood, *or as the case may be*] and that I will faithfully administer the personal estate and effects of the said testator, by paying his just debts and the legacies contained in his will [or will and codicils], so far as the same will thereunto extend and the law bind me; and that I will exhibit a true and perfect inventory of all and singular the personal estate and effects, rights and credits of the testator, and render a just and full account of my executorship whenever required by law so to do.

Sworn at ——— in the County of }
 ———, the ——— day of ———, }
 A. D. 18—, before me, }

A. B.

—————
 (*Person authorized to administer oaths under the Act.*)

14. *Oath of Administrator with Will.*

IN THE SURROGATE COURT OF THE COUNTY OF ———.

In the goods of ———, deceased.

I, ———, of the ——— of ———, in the County of ———, ———, make oath and say, that I believe this paper-writing [or these paper-writings] hereto prefixed, to contain the true and original

last will and testament of ———, late of the ——— of ———, in the County of ———, ———, and that the executor therein named [is dead, not having taken out probate, *or* has renounced all right and title to the probate and execution of the said will, *or as the fact may be*], and that I am the residuary legatee in trust named therein (*or as the fact may be*), and that I will faithfully administer the personal estate and effects of the said deceased, according to the tenor of his will (*or will and codicils*), by paying his just debts and the legacies contained in his will (*or will and codicils*), so far as the same shall thereto extend and the law bind me, and distributing the residue (if any) of the estate according to law, and that I will exhibit a true and perfect inventory of all and singular the personal estate and effects, rights, and credits of the said testator, and render a just and true account of my administration whenever required by law so to do.

Sworn at ———, in the County of }
 ———, the ——— day of ———, } A. B.
 A. D. 18—, before me, }

(Person authorized to administer oaths under the Act.)

15. *Oath for Administrators.*

IN THE SURROGATE COURT OF THE COUNTY OF ———.

In the goods of ———, deceased.

I, ———, of the ——— of ———, in the County of ———, ———, make oath and say, that ———, late of the ——— of ———, in the ———, ———, deceased, died a bachelor, without leaving parent, brother or sister, uncle or aunt, nephew or niece, and intestate; that I am the lawful cousin-german and one of the next of kin of the deceased [*alter in accordance with the cir-*

cumstances of the case]: that I will faithfully administer the personal estate and effects of the deceased, by paying his just debts, and distributing the residue (if any) of his estate according to law, and that I will exhibit a true and perfect inventory of all and singular the personal estate and effects, rights and credits, of the said deceased, and render a just and true account of my administration whenever required by law so to do.

Sworn at ———, in the County of }
 ———, the — day of ——— } A. B.
 A. D. 18—, before me, }

(Person authorized to administer oaths under the Act).

16. *Administration Bond.*

Know all men by these presents: That we A. B., of the — of —, in the —, —, C. D., of the &c., and E. F., of the &c., are jointly and severally bound unto G. H., the Judge of the Surrogate Court of the —, in the sum of — dollars, to be paid to the said G. H., or the Judge of the said Court for the time being; for which payment, well and truly to be made, we bind ourselves and — of us for the whole, our heirs, executors and administrators, firmly by these presents. Sealed with our seals. Dated the — day of —, in the year of our Lord, 18—.

The condition of this obligation is such, that if the above named A. B., the administrator of all the personal estate and effects, rights, and credits (*or as the case may be*), of —, late of —, in the —, —, deceased, (who died on the — day of —, 18—,) do, when lawfully called on in that behalf, make or cause to be made a true and perfect inventory of all and singular the personal estate and effects, rights and credits of the said deceased, which have or shall come into the hands, possession,

or knowledge of the said A. B., or into the hands and possession of any other person or persons for him, and the same so made, do exhibit or cause to be exhibited into the Registry of the Surrogate Court of the ———, whenever required by law so to do, and the same personal estate and effects, rights and credits, and all other the personal estate and effects, rights, and credits of the said deceased at the time of his death, which at any time after shall come into the hands or possession of the said A. B., or into the hands or possession of any other person or persons for him, do well and truly administer according to law : (that is to say) do pay the debts which the said deceased did owe at *his* decease, and further, do make, or cause to be made, a true and just account of *his* said administration, whenever required by law so to do, and all the rest and residue of the said personal estate and effects, rights and credits, do deliver and pay unto such person or persons respectively, as shall be entitled thereto under the provisions of any Act of Parliament now in force, or that may hereafter be in force in Ontario ; and if it shall hereafter appear that any last will or testament was made by the deceased, and the executor or executors (a) therein named do exhibit the same unto the said Court, making request to have it allowed and approved accordingly, if the said A. B., being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said Court ; then this obligation to be void and of no effect, or else to remain in full force and virtue.

Signed, sealed, and delivered in presence of } [L.S.]

(Registrar, or person authorized to administer oaths under the Act.)

(a) " Or other persons," as in Coote's Forms : *e. gr.* in the event of a will being found, in which no executor named, and a legatee should exhibit it.

17. *Administration Bond for Administrators, with Will annexed.*

X Know all men by these presents: That we, A. B., of the—— of ——, in the ——, ——, C. D., of the &c., and E. F., of the &c., are jointly and severally bound unto G. H., the Judge of the Surrogate Court of the ——, in the sum of —— dollars, to be paid to the said G. H., or the Judge of the said Court for the time being, for which payment, well and truly to be made, we bind ourselves and —— of us for the whole, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated the —— day of ——, in the year of our Lord 18—.

The condition of this obligation is such that if the above named A. B., the administrator of the personal estate and effects, rights and credits (*or as the case may be*), of ——, late of ——, in the County of ——, ——, deceased, who died on the —— day of ——, A.D. 18—, do, when lawfully called on in that behalf, make or cause to be made a true and perfect inventory of all and singular the personal estate and effects, rights and credits of the said deceased, which have or shall come into the hands, possession or knowledge of the said A. B., or into the hands and possession of any other person or persons for him, and the same so made, do exhibit or cause to be exhibited into the Registry of the Surrogate Court of the County of ——, whenever required by law so to do, and the same personal estate and effects, rights and credits, and all other the personal estate and effects, rights and credits of the said deceased at the time of his death, which at any time after shall come into the hands or possession of the said A. B., or into the hands or possession of any other person or persons for him, do well and truly administer according to law; that is to say, do pay the debts which the said deceased did owe at his decease, and then the legacies contained in the said will annexed to the said letters of administration to the said A. B. committed, so far as such personal estate will thereunto extend, and the law bind

him, and further do make, or cause to be made, a full, true and just account of his said administration when he shall be thereunto lawfully required, and all the rest and residue of the personal estate and effects, rights and credits, shall deliver and pay unto such person or persons as shall be by law entitled thereto, then this obligation to be void and of no effect, or else to remain in full force and virtue.

[L.S.]

Signed, sealed, and delivered in the presence of }
 _____ } _____

(Registrar, or person authorized to administer oaths under the Act.)

18. Affidavit of Justification by Sureties.

IN THE SURROGATE COURT OF THE COUNTY OF _____ ✓

In the goods of _____, deceased.

We, C. D., of the _____, in the County of _____, yeoman, and E. F., of the _____, in the _____, Esquire, severally make oath that we are the proposed sureties on behalf of the intended administrator of the personal estate and effects of _____, deceased in the within bond named, for the faithful administration of the said personal estate and effects of the said deceased, and I, the said C. D., for myself make oath and say, that I am possessed of estate of the value of _____ dollars, and am worth _____ dollars, all my debts being first paid, and I, the said E. F., for myself make oath and say that I am possessed of estate of the value of _____ dollars, and am worth _____ dollars, all my debts being first paid.

The above named C. D. and E. F. }
 were severally sworn before me, }
 this _____ day of _____, A.D. 18____, }
 at _____, in the _____.

C. D.

E. F.

(Person authorized to administer oaths under the Act.)

19. *Probate.*

IN HER MAJESTY'S SURROGATE COURT OF THE COUNTY
of ———.

Be it known, that on the — day of —, A.D. 18—, the last will and testament (*or* the last will and testament with — codicils of —, late of the — of —, in —, —, who died on or about the — day of —, A.D. 18—, at —, and who at the time of his death had a fixed place of abode at —, in the said County of —, [*or* "had no fixed place of abode in Ontario," (*or* "resided out of Ontario"), "but had at such time personal" (*or* "real," "estate in the said County of —,"], was proved and registered in the said Surrogate Court, a true copy of which said last will and testament is hereunder written (*or* true copies of said last will and testament, with codicil, are hereunder written), and that the administration of all and singular the personal estate and effects, rights and credits of the said deceased, and any way concerning his will, was granted by the aforesaid Court to —, of the — of —, in the — of —, —, the sole executor (*or as the case may be*) named in the said will (*or* codicil), he having been first sworn well and faithfully to administer the same by paying the just debts of the deceased, and the legacies contained in his will (*or* will and codicils), so far as he is thereunto bound by law, and to exhibit a true and perfect inventory of all and singular the said estate and effects, rights and credits, and to render a just and true account of his executorship whenever required so to do.

[L.S]

Registrar of the Surrogate Court
of the County of —

20. *Letters of Administration with Will annexed.*IN HER MAJESTY'S SURROGATE COURT OF THE COUNTY
OF ———

Be it known that ———, late of the ——— of ———, in the County of ———, ———, deceased, who died on or about the ——— day of ———, 18—, at ———, and who at the time of his death had a fixed place of abode at the ——— of ———, in the said County of ———, [*or* "had a fixed place of abode in Ontario," (*or* "resided out of Ontario,") "but had at such time personal" (*or* "real") "estate in the said County of ———"], made and duly executed his last will and testament (with ——— codicil), and did therein name ———' of ———, in &c., ———, executor thereof [*or* named no executor therein], a true copy of which said last will and testament is hereunder written (*or* true copies of which said last will and testament, with ——— codicils, are hereunder written); and be it further known that on the ——— day of ———, A.D. 18—, letters of administration, with the said will (and ——— codicils) annexed, of all and singular the personal estate and effects, rights and credits of the said deceased, were granted by Her Majesty's Surrogate Court of the County of ———, to ———, of the ——— of ——— in the ———, ——— (*insert the character in which the grant is taken, and if executor has renounced state it*), he the said ——— having previously been sworn well and faithfully to administer the same, according to the tenor of the said will, to pay the just debts of the deceased, and the legacies contained in his will (*or* will and codicil), so far as he is thereunto bound by law, and to exhibit a true and perfect inventory of all and singular the personal estate and effects, rights and credits of the said deceased, and to render a true and just account thereof whenever by law required so to do.

[L.S.]

*Registrar of the Surrogate Court
of the County of ———*

21. *Letters of Administration.*IN HER MAJESTY'S SURROGATE COURT OF THE COUNTY
OF ———

Be it known, that on the — day of —, A.D. 18—, letters of administration of all and singular the personal estate and effects, rights and credits of —, late of the — of —, in the County of —, who died on or about the — day of —, 18—, at —, intestate, and had at the time of his death a fixed place of abode at the — of —, in the said County, of — (or "had no fixed place of abode in Ontario," or "resided out of Ontario,") ["but had at such time personal or real estate in the County of —"], were granted by Her Majesty's Surrogate Court of the County of —, to —, of the — of —, in the — of —, the widow (*as the case may be*) of the said intestate, *she* having been first sworn faithfully to administer the same by paying his just debts, and distributing the residue (if any) of his personal estate and effects according to law, and to exhibit a true and perfect inventory of all and singular the said personal estate and effects, rights and credits, and to render a just and true account thereof whenever required by law.

[L.S.]

Registrar of the Surrogate Court of ———22. *Double Probate.*IN HER MAJESTY'S SURROGATE COURT OF THE COUNTY
OF ———

Be it known, that on the — day of —, A. D. 18—, the last will and testament (or the last will and testament with — codicils) of —, late of the — of — in —, —, who died on or about the — day of —, A.D. 18—,

at —— and who at the time of his death had a fixed place of abode at ——, in the said County of —— [or “had no fixed place of abode in Ontario,” (or “resided out of Ontario,”) “but had at such time personal” (or “real”) “estate in the said County of ——,”] was proved and registered in the said Surrogate Court, a true copy of which said last will and testament is hereunder written, (or true copies of which said last will and testament with codicil are hereunder written,) and that the administration of all and singular the personal estate and effects, rights and credits of the said deceased, and any way concerning his will, was granted by the aforesaid Court to ——, of the —— of ——, in the —— of ——, ——, one of the executors named in the said will [or codicil], he having been first sworn faithfully to administer the same by paying the just debts of the deceased and the legacies contained in his will, [or will and codicil,] so far as he is thereunto bound by law, and to exhibit a true and perfect inventory of all and singular the said estate and effects, rights and credits, and to render a just and true account of his executorship whenever required by law so to do. Power being reserved of making the like grant to ——, of the —— of ——, in the —— of ——, ——, the other executor named in the said will, when he should apply for the same. And be it further known, that on the —— day of ——, A. D. 18——, the said will of the said deceased was also proved, and that the like administration of all and singular the personal estate and effects, rights and credits of the said deceased, and any way concerning his will, was granted to the said ——, he having been first duly sworn well and faithfully to administer the same by paying the just debts of the deceased and the legacies contained in his will, [or will and codicil] so far as thereunto bound by and to exhibit a true and perfect inventory of all and law, singular the said estate and effects, rights and credits, and to render a just and true account of his executorship whenever required by law so to do.

[L.S.]

_____,
Registrar.

23. *Exemplification of Probate or Letters of Administration with Will Annexed.*

IN HER MAJESTY'S SURROGATE COURT OF THE COUNTY
OF ———.

Be it known, that upon search being made in Her Majesty's Surrogate Court of the County of ———, it plainly appears that on the ——— day of ———, A. D. 18—, the last will and testament [with ——— codicils] of ———, late of ———, deceased, who died at ———, on or about ———, and had at the time of his death a fixed place of abode at ———, in the said County of ———, (*or as the case may be*) was proved by ———, the executor therein named, [*or that on the ——— day of ———, A.D. 18—, letters of administration, with the last will and testament (and ——— codicils) annexed of the personal estate and effects, rights and credits of ———, late of, &c., ——— were granted to ——— of ———, as the ———*] and which said probate (*or letters of administration*) now remain of record in the said Surrogate Court. The true tenor of the said probate (*or letters of administration with the will annexed*) is in the words following, to wit:— (*here grant to be recited verbatim.*)

In faith and testimony whereof these letters testimonial are issued.

Given at ———, in the County of ———, as to the time of the aforesaid search and the sealing of these presents, this ——— day of, &c.

[L.S.]

_____,
Registrar.

24. *Exemplification of Administration.*

IN HER MAJESTY'S SURROGATE COURT OF THE COUNTY
OF ———.

Be it known, that upon search being made in Her Majesty's Surrogate Court of the County of ———, it plainly appears

that on the — day of —, A.D. 18—, letters of administration of all and singular the personal estate and effects, rights and credits of —, late of —, in the — of —. — who died at —, on or about the — day of —, and had at the time of his death, a fixed place of abode at — in the said County of —, were granted to —, of the — of —, in the —, the — [or one of the —], of the said deceased, and which said letters of administration now remain of record in the said Surrogate Court. The true tenor of the said letters of administration is in the words following, to wit: [*here the letters of administration are to be recited verbatim.*]

In faith and testimony whereof these letters testimonial are issued.

Given at —, in the County of —, at the time of the aforesaid search and the sealing of these presents, this — day of, &c.

[L.S.]

Registrar of, &c.

25. *Renunciation of Probate and Administration with the Will annexed.*

IN THE SURROGATE COURT OF THE COUNTY OF —.

Whereas A. B., late of —, in the County of —, —, deceased, died on the — day of —, 18—, and had at the time of his death a fixed place of abode at —, in the said County of —, and whereas he made and duly executed his last will and testament, bearing date the — day of —, 18—, and thereof appointed C. D. executor and residuary legatee in trust [*or as the case may be*], as I am informed and believe.

Now I, the said C. D., do hereby expressly renounce all my

right and title to the probate and execution of the said will [and codicils, *if any*], and to letters of administration, with the said will [and codicils, *if any*], annexed, of the personal estate and effects of the said deceased.

In witness whereof I have hereunto set my hand and seal, this — day of —, 18—.

Signed, sealed, and delivered	}	C. D.	[L.S.]
by said C. D., in presence			
of E. E.			

26. *Renunciation of Administration.*

IN THE SURROGATE COURT OF THE COUNTY OF —.

Whereas A. B., late of —, in the County of —, —, deceased, died on the — day of —, 18—, intestate, and a widower, and had at the time of his death a fixed place of abode at —, in the said County of —, and whereas I, C. D., of —, in the —, —, am his lawful child and his only next of kin [*to be varied according to the facts*].

Now I, the said C. D., do hereby expressly renounce all my right and title to letters of administration of the personal estate and effects of the said deceased.

In witness whereof I have hereunto set my hand and seal, this — day of —, 18—.

Signed, sealed, and delivered by	}	C. D.	[L.S.]
the said C. D., in the presence			
of E. H.			

27. Election by Minors of a Guardian.

IN THE SURROGATE COURT OF THE ——— COUNTY— OF———

Whereas A. B., late of ———, in the County of———, ———, deceased, died on or about the ——— day of ———, 18—, at ———, in, &c., intestate, a widower, leaving C. D., E. F., and G. H., his lawful children, and only next of kin, the said C. D. being a minor of the age of twenty years only, and the said E. F. being also a minor of the age of nineteen years only, and the said G. H. being an infant of the age of six years only:

Now we, the said C. D. and E. F., do hereby make choice of and elect K. L., of the ———, in the County of———, ———, our lawful maternal uncle, and one of our next of kin, to be our curator or guardian, for the purpose of his obtaining letters of administration of the personal estate and effects of the said A. B., deceased, to be granted to him until one of us attain the age of twenty-one years, [*or for the purpose of renouncing for us, and on our behalf, all right, title, and interest to and in the letters of administration, &c., as the case may be.*]

In witness whereof we have hereunto set our hands and seals this ——— day of ———, A. D. 18—.

[L.S.]

Signed, sealed, and delivered, in }
the presence of ———, }

—————

28. Subpoena in proceeding in common form to bring in Scripts

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith.

To ——— of the ——— of ——— in the County of ———, ———.

Whereas it appears by a certain affidavit, filed in our Surrogate

Court of the County of —, bearing date the — day of —, 18—, and made by —, of the, &c., that a certain original paper or script being, or purporting to be, testamentary, [*here describe the paper*] bearing date the — day of —, 18—, is now in your possession, or under your control:

Now this is to command you that within ten days (or at the time prescribed by the judge) after the service hereof on you, you do bring into and leave in the office of the Registrar of our said Court, the said original paper now in possession of you, the said —, or under your control, or in case the said original paper be not in your possession or under your control that you within — days after the service hereof upon you, do file in the said office an affidavit to that effect, and therein set forth what knowledge, if any, you have of and respecting the said original paper or script; and this you are in no wise to omit under the penalty of four hundred dollars.

Witness, [*insert the name of the Judge*] Judge of our said Court, at —, the — day of —, 18—.

Registrar County of —

29. *Affidavit of Handwriting.*

IN THE SURROGATE COURT OF THE COUNTY OF —

In the goods of, &c.

I, A. B., of the — of — in the County of —, —, make oath [or solemnly affirm] that I knew and was well acquainted with C. D., late of — in the County —, deceased, who died on the — day of —, 18—, at —, and had at the time of his death a fixed place of abode at —, in the said County of —, for many years before, and down to the time of his death, and that during such

period I have frequently seen him write, and also subscribe his name to writings, (*or as the case may be*), whereby I have become well acquainted with his manner and character of hand-writing and subscription, and having now with care and attention perused and inspected the paper-writing hereunto annexed, purporting to be and contain the last will and testament of the said deceased, beginning thus
ending thus

and being subscribed thus "C. D." I further make oath that I verily and in my conscience believe the whole body, series, and contents of the said will, (*or as the case may be*), together with the name "C. D." subscribed thereto, as aforesaid, to be of the true and proper hand-writing and subscription of the said "C. D.," deceased.

Sworn at —, in the County of	}	A. B.
— this — day of —,		
18—, before me.		

(*Person authorized to administer oaths under the Act.*)

30. *Affidavit of Plight and Condition and Finding.*

IN THE SURROGATE COURT OF THE COUNTY OF _____

I, A. B., of, &c., make oath (*or solemnly affirm*) that I am the sole executor named in the paper-writing now hereunto annexed, purporting to be and contain the last will and testament of E. F., late of, &c., deceased (who died on the — day of — at —), and had at the time of his death a fixed place of abode at —, in the said County, (*or as the case may be*) the said will bearing date the — day of —, beginning thus
ending thus

and being subscribed thus "C. D.,"
and having viewed and perused the said will, and particularly

observed that [*here recite the finding of the said will, and the various alterations, erasures, and interlineations, (if any,) and the general plight and condition of the will, or any other matter requiring to be accounted for, and clearly trace the will from the possession of the deceased in his lifetime, up to the time of making the affidavit*] I, the deponent, lastly make oath that the same is now in all respects in the same state, plight, and condition as when [*or as the case may be*].

Sworn at —, in the County of }
 —, 18—, the — day of — } A. B.
 A.D., 18—, before me, — }

(Person authorized to administer oaths under the Act.)

31. Caveat

IN THE SURROGATE COURT OF THE COUNTY OF _____

Let nothing be done in the goods of A. B., late of the — of — in the —, —, deceased, who died on the — day of —, at —, and had at the time of his death a fixed place of abode at —, in the County of — [*or “who had no fixed place of abode in Ontario” [or “who resided out of Ontario,” “but had at such time personal” (or “real”) “estate in the County of —,” (or in the several Counties of —, —), unknown to C. D., of the — [or to E. F., of —, the Attorney of C. D., —.] The said C. D. is the lawful child, and the only next of kin (or as the case may be) of the said deceased —. The grounds on which this caveat is entered are, that a paper-writing, alleged to be the will of the deceased, was not executed by him (or as the case may be.)*

C. D., of —
 Or E. F., Attorney for C. D., of —.

32. *Warning to Caveat.*

IN THE SURROGATE COURT OF THE COUNTY OF —

To — of — (or to, &c., of —, the Attorney of —) having interest.

You are hereby warned, that within ten days after the service of this warning upon you, inclusive of the day of such service, you cause an appearance to be entered for you in the office of the Surrogate Court of the County of —, to the caveat entered by you in the personal estate and effects of —, late of —, who died on or about the — day of —, at —, and had at the time of his death a fixed place of abode at — (or as stated in the caveat), and to set forth your (or your client's) interest, and take notice that in default of your so doing, the said Court will proceed to do such acts, matters, and things as shall be needful and necessary to be done in and about the premises.

[L.S.]

*Registrar of the Surrogate Court
 of the County of —*

33. *Notice of Caveat being lodged with Registrar of a Surrogate Court.*

IN THE SURROGATE COURT OF THE COUNTY OF —

To the Surrogate Clerk:

In the goods of —, deceased.

A caveat, of which the following is a copy, has this day been lodged with me: "Let nothing," &c., (*here copy caveat at length and verbatim.*)

Dated —.

Registrar.

34. *Bond on Appeal to Court of Appeal* (a).

KNOW ALL MEN BY THESE PRESENTS:

That we, A. B., of C. D., of, &c., and E. F., of &c., are jointly and severally held and firmly bound unto G. H., of &c., in the penal sum of ——— dollars, for which payment to be well and truly made, we bind ourselves, and each of us by himself, our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, this day of ———, 18—.

Whereas, ———, [the appellant] considers himself aggrieved by a certain order (*or as the case may be*) made by the Judge of the Surrogate Court of the County of ———, made on or about the ——— day of ———, last, in a certain (*mention matter or cause in which order made*), and whereas the value of the goods and chattels affected by this said order exceeds \$200, wherefore he, the said ——— [*the appellant*] desires to appeal therefrom to the Court of Appeal.

Now the condition of this obligation is such that if the said ———, [*the appellant*] shall effectually prosecute his appeal and pay such costs, charges, and expenses as shall be awarded in case the said order shall be affirmed, or in part affirmed, then this obligation to be void otherwise to remain in full force.

Signed and sealed in presence	}	A. B.,	[L.S.]
of		C. D.,	[L.S.]
—————		E. F.,	[L.S.]

(a) The Court of "Appeal" substituted for "Chancery."

BOOKS TO BE KEPT BY THE REGISTRARS OF THE SURROGATE COURTS.

 SURROGATE COURT, COUNTY OF (Simcoe).

35. NON-CONTENTIOUS BUSINESS BOOK.

No. of Appli- cation.	Name, Residence, and Addi- tion of Deceased.			Time of Death.	When appli- cation received	Name, Residence, and Addi- tion of Applicant.			Nature of Applica- tion.	When Notice to Sur- rogate Clerk mailed.	When Certi- ficate of Surro- gate Clerk received.	Nature of matter certified.	Date and na- ture of order or direction by Judge with re- ference to re- Grant Book, if Grant ordered.	Collateral pro- ceedings with references to the entries in Grant Book, if other books.
	Name.	Residence.	Addition.			Name.	Residence.	Addition.						
1	J. Jones	Town of Barrie, County of Simcoe.	Esquire.	10th Sep. 1888.	1st Oct., 1888.	Ja. Jones	Town of Colling- wood, County of Simcoe.	Merchant.	For Probate of will as sole Execu- tor.	1st Oct., 1888.	4th Oct., 1888.	No other appli- cation— No Caveat. No. 6, page 12, on Grant Book	5th Oct., 1888, for grant, same day Probate issued—see Caveat.	
2	Jn. Day	Vespra, County of Simcoe.	Carpenter.	24th Sep. 1888.	2nd Oct. 1888.	R. Day.	Floa. County of Simcoe.	Mason.	For letters of adminis- tration as next of kin.	4th Oct., 1888.	7th Oct., 1888.	No other appli- cation— No Caveat.	8th Oct., 1888, widow of deceased to be cited.	Citation to Mary Day 12th Oct., 1888, Process Book, page --.

SURROGATE COURT, COUNTY OF (Simcoe).

36. GRANT BOOK.

Name, Residence, and Addition of Deceased.			Time of Death.	Date of Grant.	Name, Residence, and Addition of Executors or Administrators.			Nature of Grant.
Name.	Residence.	Addition.			Name.	Residence.	Addition.	
Adams, James.	Barrie.	Esquire.	24th July, 1868.	24th Sept., 1868.	James Jones and Thomas Jones, Executors.	Barrie.	Esquire.	Probate of Will, and Codicil.

SURROGATE COURT, COUNTY OF (Simcoe).

37. PROCESS BOOK.

Name, Residence, and Addition of Deceased.			Name of Applicant	Nature of Process, to whom directed, or whom to be affected.	When issued.	When Returnable.	Action thereon.
Name.	Residence.	Addition.					
John Dick.	Mono Mills, County of Simcoe	Yeoman.	Mary Dick.	Subpoena to bring in Script.	9th October, 1888	Eight days after service.	

38. REGISTER BOOK.

(In this book every grant is to be entered at length, with a transcript of will and codicil, if any, subjoined, in case of probate or administration with the will annexed.)

SURROGATE COURT, COUNTY OF (Simcoe).

39. CAVEAT BOOK.

No. of Appli- cation.	Name, Residence, and Addition of Deceased.		When Caveat lodged.	Name, Residence, and Addition of Party entering.			Nature of Party's interest in the goods of deceased.	Address as given in Caveat.	When Notice sent to Surrogate Clerk.	If Caveat warned, when.
	Name.	Residence.		Name.	Residence.	Addition.				
4	Moses Mack.	Town of Bradford, County of Simcoe.	1st Oct., 1888	John Mack.	City of Toronto.	Esquire.	As next of kin.	"Toronto."	2nd October, 1888.	

40. *Certificate by the Surrogate Clerk upon notice of application for Grant.*

OFFICE OF THE SURROGATE CLERK.

In the goods of ———, deceased, named in a certain notice of application for grant of probate (*or administration, as the case may be,*) dated the ——— of ———, 18—, as ———, late of ———, &c., (*copy from notice of application.*)

I, ———, the Surrogate Clerk, do hereby certify that no notice of application, in respect to the goods of the said deceased, has been received by me from any of the Registrars of the Surrogate Courts in Ontario, save the above [*or if another notice has been received, add "and a certain other notice of application from the Registrar of the Surrogate Court of the County of ———," (dated the ——— day of ———, &c.,) for a grant (of the probate of the will bearing date, &c., as in the notice of application.)*]

And I further certify that no caveat or copy of caveat against the grant of probate or administration in the goods of the said deceased, has been lodged with or received by me [*or if caveat or notice of caveat has been lodged or received, instead of the above, say, "and I further certify that a caveat (or copy of a caveat,) in the goods of the said deceased, has been lodged with (or received by) me on the ——— day of ———, a copy of which is hereunto annexed.*]

Surrogate Clerk.

Dated ———.

41. APPLICATION BOOK

OFFICE OF THE SURROGATE CLERK.

No. of Appl. caption.	Name, Residence, and Addition of Deceased.			Time of Death.	When Notice Received.	Name, Residence, and Addition of Applicant.			Nature of Applica- tion.	Court into Which Applica- tion made.	When Certificate of Surro- gate Clerk mailed.	Note of matter certified.
	Name.	Residence.	Addition.			Name.	Residence.	Addition.				
1	Edw. Tucker	Hamilton.	Merchant.	1st Jan., 1858.	26th Sept., 1858.	John Dean.	Hamilton.	Surveyor.	For Pro- bate as Executor.	of Went- worth.	27th Sept., 1858.	No other Application. No Caveat.

42. CAVEAT BOOK.

OFFICE OF THE SURROGATE CLERK.

No. of Caveat.	Name, Residence and Addition of Deceased.			When Caveat or Copy of Caveat received.	If a copy of Caveat, from what Court received.	Name, Residence and Addition of Party Entering.			Nature of party's interest in goods of deceased.	Address as given in Caveat.	If notified to the Register of a Surrogate Court, when, and number of notice of application upon which notification made.
	Name.	Residence.	Addition.			Name.	Residence.	Addition.			
1	John Jones	London.	Carpenter	24th Sept., 1888.	Of Middlesex.	Wm. Jones.	London.	Carpenter	As next of kin, or "residuary legatee," (as the case may be).	"City of London," C. W."	

43. GRANT BOOK.

OFFICE OF THE SURROGATE CLERK.

Name, Residence, and Addition of Deceased.			Time of Death.	Date of Grant.	Name of Executors or Administrators.	Nature of Grant.	In what Court.
Name.	Residence.	Addition.					
Adams, James	Toronto.	Esquire.	24th July, 1858.	24th Sept., 1858.	James Jones and Thomas Jones, Executors.	Probate of Will and Codicil.	Of York and Peel.

APPOINTMENT OF GUARDIANS.

SURROGATE COURT RULES

AS TO

GUARDIANS. (a)

(1) 73 & 74th
secs. S. C. Act
R. S. O. The Judges appointed under the 14th⁽¹⁾ section of
the Surrogate Courts Act, 1858, do in pursuance of
(2) R. S. O. c.
132, s. 7. the powers conferred upon them by the 64th⁽²⁾ sec-
tion of the said Act, order and direct that the rules,
orders, and directions hereinafter set forth shall be
the general rules and orders :—

For regulating the practice and procedure
under the Act of Upper Canada passed the
eighth year of King George IV., c. 6, intituled,
“*An Act respecting the appointment of guar-
dians ;*” and for fixing and regulating the fees
to be taken by officers and attorneys, and coun-
sel respectively, for business and proceeding
done and taken under the said last mentioned
Act.

Practice and
procedure.

1. In all matters and applications touching or re-
lating to the appointment, control, or removal of
guardians of infants, and the security to be given by
such guardians, the practice and procedure in the
Surrogate Courts shall conform as nearly as the cir-
cumstances of the case will admit to the practice
and procedure of the said Courts in respect to appli-

(a) *Vide*: “ Act respecting Guardians of Infants ” ante, p. 65.

cations for grants of letters of administration and grants thereof.

2. Applications for the appointment of guardians may be according to the form 1, or to the like effect. Form of application.

3. The notice of such application, to be sent by the Registrar to the Surrogate Clerk, may be in the form 2, or as near thereto as circumstances admit; and, as in application for grant of probate or administration, unless under special order or decree of the Judge, letters of guardianship shall not be granted until the Registrar shall have received the certificate of the Surrogate Clerk touching the same. Form of notice.

4. Parties may lodge a caveat against the grant of letters of guardianship in like manner as other caveats are lodged, and the practice in respect to the same shall conform as nearly as may be to the practice in the case of caveats against the grant of administration. Caveat.

5. The security to be given by guardians shall be by bond in the form 4, or as near thereto as circumstances will admit. Security.

6. Letters of guardianship may be in the form 3, or to the like effect. Form of letters.

7. The several Registrars shall keep books as nearly as may be in the form 5, and the Surrogate Clerk shall keep a book as nearly as may be in the form 6. Books to be kept.

8. Registrars and officers of the Surrogate Courts shall, for the performance of duties and services under the said Act of King George the Fourth, touching or relating to the appointment, control, or Fees of officers.

removal of guardians, be entitled to take and receive to their own use the same fees, as nearly as the circumstances of the case will admit, as they may be entitled to take and receive in contentious or non-contentious business, as the case may be, in the said Courts.

By whom
payable.

9. The fees payable to the fee fund, and Registrars, on such business and proceedings in the Surrogate Courts (and postage, when necessary), shall be paid to the Registrar in the first instance by the party on whose behalf such proceeding is to be had, on or before such proceeding.

Attorneys
fees.

10. Attorneys practising in the said Courts shall be entitled to take for the performance of duties and services as aforesaid, in relation to the appointment, control, and removal of guardians, the same fees, as nearly as the circumstances of the case will admit, as they are entitled to take in non-contentious business in the said Courts.

Duties of Sur-
rogate Clerk.

11. The duties required of the Surrogate Clerk in respect to matters and causes testamentary, so far as may be applicable, he shall perform in respect to applications for letters of guardianship, and in relation to guardianship business.

ROBERT E. BURNS, J.
J. G. SPRAGGE, V. C.
JAS. R. GOWAN, Co. J.

TORONTO, 29th September, 1858.

GUARDIANSHIP FORMS.

1. *Application for Letters of Guardianship by one of the next of kin of infant children of deceased widower.*

UNTO THE SURROGATE COURT OF THE COUNTY OF ———

The petition of A. B., of the——— of ——, in the County of ——, Esquire,

Humbly sheweth,

That C. D., late of., &c., died on or about the —— day of ——, 18——, a widower, leaving E. F. and G. H., his natural and lawful children, the said E. F. being an infant of the age of nine years, and the said G. H. being an infant of the age of six years, and that both the said E. F. and G. H. reside at—— in the said County of ——.

That the said C. D. died intestate (*or as the case may be*), and without appointing any curator or guardian of the said infants

That due notice has been given of the petitioner's intention to apply to be appointed guardian, and that the petitioner is the natural uncle, and one of the next of kin of the said infants.

Wherefore your petitioner prays that he may be appointed guardian of the said infants, E. F. and G. H., and that the letters of guardianship may be granted to him by

this Honourable Court, pursuant to the Statute in that behalf.

A. B.,

(Or if signed by Attorney, A.B., by his Attorney, J. P., one, &c.)

Dated, &c.

2. *Notice to be transmitted by the Registrar of a Surrogate Court to the Surrogate Clerk, of application for Letters of Guardianship by one of the next of kin of infant children of deceased widower.*

THE SURROGATE COURT OF THE COUNTY OF ———

To the Surrogate Clerk :

Take notice that application has been made to the Surrogate Court of the County of——, by A. B., of, &c., to be appointed guardian to E. F. and G. H. (who reside at the —— of ——, in the said County) infant children of C. D., late of, &c., who died a widower intestate (*or as the case may be*), and without appointing any curator or guardian of the said infants, the said A. B. being the maternal uncle of the said infants.

Application received the —— day of —— 18——.

This notice mailed the —— day)
of ——, 18——.) *Registrar of the said Court.*

3. *Letters of Guardianship.*

IN HER MAJESTY'S SURROGATE COURT OF THE COUNTY
OF ———

Whereas A. B., of, &c., by petition to the said Court, did set forth that C. D., late of, &c., (*recite as in petition*), and prayed

that he might be appointed guardian of the said infants, pursuant to the Statute in that behalf, and that Letters of Guardianship might be granted to him by the said Court.

Be it known that on the — day of —, A. D. 18—, the said A. B. was appointed guardian of them the said E. F. and G. H., and these Letters of Guardianship are accordingly granted by the said Court to the said A. B., with power and authority to him to do all such acts, matters, and things as a guardian may or ought to do, under and by virtue of any Act of the Parliament of Ontario, or of this Dominion, relating to minors and their property, chaptered six, he the said A. B. having been first bound as required by law to perform the said trust.

[L.S.]

Registrar.

NORR.—The words "chaptered six" apparently surplusage. As to authority of guardian, *vide ante*: "Act respecting Appointment of Guardians."

4. *Bond to be given by Guardian.*

Know all men by these presents: That we, A. B., of, &c., C. D., of, &c., and E. F., of, &c., are held and firmly bound unto G. H. and J. H., of, &c., the infant children of O. H., of, &c., deceased, in the following penal sums, that is to say, the said A. B. in the sum of — dollars, the said C. D. in the sum of — dollars, and E. F. in the sum of — dollars: For which payment, to be well and truly made unto the said G. H. and J. H., we bind ourselves and each of us by —: our and every of our executors and administrators firmly by these presents: Sealed with our seals, dated this — day of —, in the year of our Lord, 18—.

Whereas the said A. B., being appointed guardian of the said infants by the Surrogate Court of the County of —, according to the Statute in that behalf, is required to give security to perform the said trust.

Now the condition of this obligation is such, that if the above bounden A. B., guardian to the infant children of the said late O. H., shall faithfully perform the said trust, and that the said guardian, or — executors or administrators will, when the said wards respectively become of the full age of twenty-one years, or whenever the said guardianship shall be determined, or sooner if thereunto required by the Judge of the said Surrogate Court, render to — said wards, or to their executors or administrators, a true and just account of all goods, moneys, interests, rents, profits, or property of such wards which shall have come into the hands of the said A. B., and will thereupon, without delay, deliver and pay over to the said wards, or to — or their executors or administrators, the property or the sum or balance of money which may be in the hands of the said guardian belonging to such ward or wards, deducting therefrom and retaining a reasonable sum for the expenses of the said guardian, then this obligation to be void or else to remain in full force and virtue.

Signed Sealed, and Delivered }
in presence of }

A. B. [L.S.]
C. D. [L.S.]
E. F. [L.S.]

[NOTE.—The Affidavit of Death, Value of Property, and search for Will, if deceased died intestate, same as in cases of Administration, *vide ante*; and for Notice of Application *vide App.* A full Inventory is also required. The allegations contained in the petition are verified by affidavit.]

SURROGATE COURT, COUNTY OF —.

5. GUARDIAN BOOK.

[illegible]

FOR THE SURROGATE CLERK'S OFFICE.

6. GUARDIAN BOOK.

Name of Father of Minors, and Residence at time of his Decease,	Names and Places of Resi- dence of Minors.	When Notice Received.	From what Surrogate Court.	Name, Residence and Address of Applicant.	When Certificate to Registrar of Surrogate Court mailed.	Nature of matter Certified.

NOTE.—For schedules of fees payable to the Crown, and fees allowed to the Judge.
See Schedules A and B, to S. C. Act, *ante*.

A.

TABLE OF FEES.

*To be taken by Registrars and Officers of the Surrogate Court for duties
and services under the Act, in respect to non-contentious business :*

BY REGISTRARS (a).

Receiving and entering application for probate or administration, and transmitting notice thereof to the Surrogate Clerk (exclusive of postage)	\$ 50
Receiving and entering certificate of Surrogate Clerk	10
Preparing all the necessary affidavits in a matter of probate or administration	1.00
Every bond on administration or otherwise, with affidavit of sufficiency	1.00
Preparing instrument of renunciation with affidavit of execution	1.00
On every grant of probate or administration, and entering the same in Register Book, as follows :	
When property devolving is under \$1200.....	1.00
" " " from \$1200 to \$4000...	1.75
" " " from \$4000 to \$8000...	2.50
" " " above \$8000.....	4.00
Recording will, in addition, per folio	10
For probate or administration issued under the seal of Court, each instrument	50
(If special, may be charged at 10 cents per folio on order of the Judge.)	
Transcript of will, in addition, per folio	10
Notice of grant to Surrogate Clerk	25
Certified copy of will, in addition, per folio.....	10

(a) See *Re Dallas*, post p. 142.

Drawing special orders or other instruments directed by the Judge, per folio	\$ 10
Taking every affidavit	20
Attending and entering every order made, or proceeding had, on a special attendance, or attendance for audit by Judge	50
Every summons, citation, or other process issued under seal of the Court.....	50
If over three folios, in addition, per folio.....	10
Filing caveat, and transmitting notice thereof to Surrogate Clerk, exclusive of postage.....	50
Warning to a caveat (exclusive of postage), and noting same.....	50
Receiving and entering bond on appeal.....	25
Receiving and entering order or direction from the Court of Chancery.....	25
For search by a party in the Registrar's books	10
For looking up original will or instrument, and inspection	30
Every certificate of search or extract	50
If over three folios, in addition, per folio.....	10
Exemplification under seal of Court.....	1.00
If exceeding five folios, per folio	10
For depositing every will of a living person for safe custody, including a deposit receipt	50
For taxing costs, and granting certificate	50
[No fee allowed for filing papers in non-contentious business.]	

BY SHERIFFS (OR BY APPARITORS WHERE SUCH OFFICERS HAVE BEEN APPOINTED.)

Serving process or other instruments or paper	\$ 50
Every arrest under process, or by order of the Court.....	1.00
Necessary mileage to serve process or to arrest party, per mile actually travelled (a).....	10

(a) Where process actually served or party arrested, mileage in travelling on one way allowed.

TABLE OF FEES.

141

Mileage conveying party to gaol, per mile (to cover all disbursements)	\$ 20
Making returns to process, instruments or paper	20
[Allowance for other services to be specially fixed by Judge, taking the County Court Tariff of Fees as a guide.]	

B.

TABLE OF FEES,

To be taken by Attorneys in respect to Business and Services under the Act in non-contentious cases.

Consulting fee.....	\$1.00
Preparing all necessary papers and proofs, and passing Probate or Administration through a Surrogate Court in ordinary cases, as follows :	
Where property devolving is under \$1,200.....	2.00
" " " from \$1200 to \$4000...	3.00
" " " from \$4000 to \$8000...	4.00
" " " over \$8000.....	6.00
[In case of limited or other special grant, an additional sum not exceeding \$4.00 may be allowed on order of the Judge.]	
For every necessary attendance before Judge when matter special.....	1.00
[No allowance for ordinary attendance in common form business.]	
Affidavits to lead citation and affidavits other than those to lead grant—each.....	50
If over three folios, per folio additional.....	10
Fee on subpoena to bring in script, and on citation or or other instrument under seal of Court.....	50
Preparing caveat and entering same.....	1.00
Attending and giving written instructions for warning caveator.....	50

Preparing bond on appeal, with affidavit of execution, and affidavit of justification	\$3.00
Notice of appeal, copy and service.....	1.00
Bill of costs.....	50

By Order in Council of 27th of February, 1875, it was ordered—“that the following fees be payable to the Judges and Registrars of the Surrogate Courts respectively upon proceedings had in the said courts, for grant of letters of administration in cases where the whole personal estate and effects of the deceased do not exceed \$200. The said fees to be retained by the said officers for their own use, and to be in lieu of the fees prior to 38 Vic., c. 18, payable in such cases to the said officers, or to the Crown.

To be Received by the Registrar :—

On every application for administration (including notice thereof to Surrogate Clerk, but not postage).....	0 25
Providing and filling up forms to lead to grant of administration	0 75
Fee on letters	0 50

To be received by Judges :—

On every grant of administration certified.....	0 50
---	------

27th Feb., 1875.

[NOTE.—*Registrar's Fees*.—The Court of Queen's Bench, *in re Dallas* (29 Q. B. 482), decided the following points as to charges in the Registrar's office :—

(1) A Surrogate Registrar is not entitled to charge for the application, for he does not prepare it. His duty begins with receiving and filing it.

(2) For all affidavits which should properly be made in his office, he is entitled to charge, though he does not prepare them, and to administer the oath, and charge for it ; but he can make no charge for swearing a deponent, unless he actually does so. *Semle*—that he cannot charge for the affidavit of the place of abode of the intestate, and of intestacy, for these affidavits may accompany the application.

(3) He may charge for the bond, though the attorney may have prepared it.

(4) The attendance of the Judge to sign his fiat for the grant is not a special attendance under Schedule "B" of the Act, and the Judge is therefore not entitled to the fee of \$1.00 for such attendance; nor is the Registrar entitled to a fee of 10 cents on it, as for drawing a special order, nor of 50 cents for attending and entering it as an order on a special attendance.

PART III.

CHAP. I.

OF THE NECESSITY FOR APPOINTMENT OF PERSONAL REPRESENTATIVES.

To the personal estate of a deceased there is, by the law of England, no succession of the person or persons who are beneficially entitled to it. And as, under that law, the right of succession, whether in the case of a total intestacy, or of a person dying testate, but appointing no executor, or the executor being incapable of acting, the personal estate was vested in the ordinary, or in the Judge of the Probate Court, who delegated each succession to some person or persons interested in such estate (a); so, in a similar manner, the right of succession to the personal estate of a deceased in Ontario would seem to be vested in the several Surrogate Judges, until such succession be delegated by the Judge to some other person. Accordingly, by the form of the letters of administration, such delegation is a grant passing from the Surrogate Judge to the person to whom the trust is committed; and the bond for the faithful performance of the trust is taken to the Judge.

Letters of administration constitute the sole authority for the administration of personal estate of a person who has died intestate (b).

And although the right of the executor is derived

(a) Coote 8th ed. pp. 19, 20.

(b) *Vide post* "Administrations."

Succession to
personal estate

Letters of
Adm'n authority
of adm'or.

Letters Pro-
bate.

from the will (a), and not from the probate; yet the latter is the indispensable and only recognisable evidence of his title or right to deal with the personality (b).

Suits or actions can neither be brought nor defended on behalf the estate until a personal representative, clothed with authority by the Surrogate Court, has been appointed.

A purchaser is not bound to pay purchase money till probate, because until the evidence of title exist the executor cannot give a complete indemnity. (Wms on Exors. 7th ed. 304.)

Following the English practice it would seem that if a will be limited to property in a foreign country, it is not entitled to probate in this country (c). If assets in Foreign Country.

But if an executor desire to sue in any Court of this country, it is necessary that he should prove the will of his testator here, even though all the assets were abroad at the time of the death of the deceased; for the probate or the act book of which the probate is a copy is the only admissible evidence of his character of executor (d).

A foreign grant is not sufficient to authorize executors or administrators to deal with assets in this country. A foreign administrator cannot effectually release a mortgage on land in this Province (e). Foreign grants not effectual in Ontario.

Nor is a foreign executor entitled to have assets

(a) The title of the executor being derived from the will and not from the probate, the Court refused to restrain an execution on a judgment recovered against the executor before probate (*Stump v. Bradley*, 15 Gr. 30).

(b) *Allan v. Dundas*, 3 T. R. 125 (*forged will case*); *Smith v. Miles*, 1 T. R. 475, 480; Taylor on Ev. 6th Ed, p. 1361; Wms on Exors, 7th Ed. 304. And *vide ante note to sec. 4*.

(c) *Coode*, 36 L. J. (N. S.) P. & M. 129, and 1 L. R. P. & D. 449.

(d) *Cox v. Allingham*, Jac. 514, and see *Kelly v. Ardell*, 11 Gr. 579.

(e) *Re Thorpe*, 15 Gr. 80.

left in this Province transmitted to him by virtue of his foreign probate (a).

A personal representative must be appointed by the Surrogate Court before the Court of Chancery will make an order or decree for the administration of the estate (b).

Upon an application in Chancery for an administration order against a person named as executor who had not obtained letters probate the order was refused, there being no duly appointed personal representative before the Court (c).

Expenses of
Probate, &c.

Next after the payment of funeral expenses, the expense of proving the will or taking out letters of administration are allowed out of the estate within proper limitations (d).

But where in a creditor's suit, to administer the estate of a deceased debtor to whose estate administration *ad litem* had been taken, the bill alleged that there were no personal assets, and the parties interested in the real estate had suffered the bill to be taken against them *pro confesso*, and did not appear at the hearing; the Court made the usual decree without requiring a general administration to be first obtained (*Dey v. Dey*, 2 Gr. 149.)

Compensation
under Lord
Campbell's
Act.

Personal representation of a deceased person killed by accident must be obtained, in order to bring an action for compensation, though the amount of such compensation will form no part of the personal estate of the deceased (e).

(a) *Shaver v. Gray* 18 Gr. 419.

(b) *Re Marshall, Fowler v. Marshall*, 1 Chy Chamb. 29; *Re Israel*, 2 Chy Chamb. 392. *Re Bell, Bell v. Bell*, 3 Chy Chamb. 397; *The Edinburgh Life Ass'ce Co. v. Allan* 19 Gr. 593.

(c) *Outram v. Wyckoff*, 10 U. C. L. J. (N. S.) 135; see *Rowcell v. Morris*, L. R. 17; Eq. 20.

(d) Williams on Exors. 7th Ed. 988, and see *Smith v. Rose*, 24 Gr. 438.

(e) *Barnes v. Ward*, 9 C. B. 392; *Blake v. Midland Railway Co.*, 21 L. J. Q. B. 233.

It is provided by 10-11 Vic. c. 6, (R. S. O. c. 128), "An Act for compensating the Families of Persons killed by Accident," that the action (allowed by the Act) "shall be for the benefit of the wife, husband, parent and child of the person whose death has been so caused, and shall be brought by and *in the name of the executor or administrator of the person deceased*; and in every such action the judge or jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action has been brought: and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the judge or jury, by their verdict, shall find and direct" (a).

Action, negligence, &c., causing death.

And the Act to secure to wives and children the benefit of assurances on the lives of their husbands and parents, R. S. O. c. 129, provides for payment of the moneys by the company to *executors or administrators*, or to the *guardian* of infants duly appointed by one of the Surrogate Courts.

Life Assurance.

The "Act respecting Building Societies," (b) provides that a member, investor or depositor of a sum not exceeding \$200, may nominate a successor to whom the amount will be paid upon decease of such member; and in case of his death intestate, and without having made any such nomination that the society may pay the amount to the person entitled under the Statute of Distributions without taking out letters of administration, upon receiving a statutory declaration of death and intestacy.

Building Societies.

Exceptions. Statutory declaration.

(a) See *Grant, Administratrix, &c., v. The G. W. Ry.*, 7 U. C. C. P. 438; *Secord v. The G. W. Ry.*, 15 Q. B. 631; *Morley v. The G. W. Ry.*, 16 Q. B. 504; *Denny v. Montreal Tel. Co.*, 42 Q. B. 577.

(b) R. S. O. c. 164, s. 35.

The Post Office Savings Bank.

Post Office
Savings Bank.

Under Statute of Canada 31 Vict. c. 10, for establishing Post Office Savings Banks, the following Regulations issued by authority of the Postmaster-General apply to the payment of money of a deceased depositor to the persons entitled :

Funds of deceased Depositors, not exceeding \$300.

“ 15. In case any Depositor shall die, leaving any sum of money not exceeding \$300, exclusive of interest, deposited in the Post Office Savings Bank, and Probate of his Will, or Letters of Administration, or Actes of Curatelle, or Tutelle, be not produced to the Postmaster-General, or if notice in writing of the existence of a Will and intention to prove the same, or to take out Letters of Administration, or be appointed Tutor or Curator, be not given to the Postmaster-General, at the Post Office Department within the period of one month from the death of the Depositor ; or, if such notice be given, but such Will be not proved, or Letters of Administration or Actes of Curatelle or Tutelle be not taken out, and the Probate or Letters of Administration, Actes of Curatelles or Tutelle (as the case may be), produced to the Postmaster-General within the period of two months from the death of the Depositor, it shall be lawful for the Postmaster-General, after such period of one or two months, as the case may be, to pay and divide such funds at his discretion to or amongst the widow, or relatives of the deceased Depositor, or any one or more of them ; or if he shall think proper, according to the provisions of law governing the distribution of property in all such cases.

Funds of deceased Depositors, above \$300.

“ 16. In case any Depositor shall die leaving any sum of money in the Post Office Savings Bank, which (exclusive of interest) shall exceed the sum of \$300.00, the same shall only be paid to the Executor or Administrator, Tutor or Curator on the production of the Probate of the Will, Actes of Tutelle or Curatelle or Letters of Administration of the Estate or Effects of the deceased Depositor, to the Postmaster-General.

Payment, on death of a Depositor, being illegitimate,

“ 17. If any Depositor, being illegitimate, shall die intestate, leaving any person or persons who, but for the illegitimacy of such Depositor, and of such person or persons, would

be entitled to the money due to such deceased Depositor, it shall be lawful for the Postmaster-General, with the authority, in writing, of the Attorney-General of Canada, to pay the money of such deceased Depositor, to any one or more of the persons who, in his opinion, would have been entitled to the same, according to Law, if the said Depositor, and such person or persons, had been legitimate." and dying intestate.

It will be seen that when the sum (exclusive of interest) exceeds \$300.00 Letters Probate or letters of Administration must be produced. And even if under that amount, it will greatly facilitate the payment if there is a properly constituted personal representative.

The Dominion Government Savings Bank.

By section 10 of 34 Vict. c. 6, being "*An Act to provide additional facilities for depositing savings at interest with the security of the Government, and for the issue of Dominion notes,*" the Governor in Council has power to make regulations respecting, *inter alia*, the payment or transmission of deposits, in case of death of the Depositor. Dominion Government Savings Bank.

The practice in the Receiver-General's Department, as to requiring, or not requiring, production of letters probate or administration, is the same as that above quoted in connection with Post Office Savings Banks, no separate regulations having been officially promulgated.

For Form of Application by an executor, or administrator, for payment, and of Statutory Declaration in case of missing pass-book, *vide App.*

The blank forms are to be obtained at the offices of Assistant Receivers-General, in proper cases.

The general "Act relating to Banks and Banking," 34 Vict. c. 5, s. 21, provides that if the interest in any share or shares in the capital stock of a bank General Banking Act of Canada.

Transmission
of shares.

becomes transmitted in consequence of the death of the shareholder, such transmission shall be authenticated by declaration in writing as thereafter mentioned, or in such other manner as the directors of the bank shall require, and that every such declaration shall distinctly state the manner in which, and the party to whom, such shares shall have been transmitted, and shall be by such party made and signed, and be by the party making and signing the same acknowledged before a Judge of a Court of Record, or before the Mayor, Provost, or Chief Magistrate of a city, town, borough, or other place, or before a Public Notary, where the same shall be made and signed, to be left with the proper officer of the bank (with further provision if executed out of British Dominions). And sections 23 and 24 provide that with such declaration the probate or letters of administration, or an *official extract therefrom*, or (*sec. 24*) any *authenticated copy of the probate* or letters of administration, shall be produced and deposited, to justify the entry of the name of the party entitled under such transmission on the register of shareholders.

Declaration
and letters pro-
bate, &c.

Other Savings Banks.

Other Savings
Banks.

The "Act respecting certain Savings Banks in Ontario and Quebec," 34 Vict., c. 7, provides for the entry of the name of an executor or administrator in the books of the bank where transmission of interest in any deposit or share has taken place by virtue of any testamentary instrument, or by intestacy, on the probate of the will, or letters of administration, together with a statutory declaration, stating "the manner in which, and the party to whom, such deposit shall have been transmitted," being produced to, and left with, the proper officer of the bank (*vide* Secs. 28 & 29).

The requirement that the letters probate, or letters of administration, shall be left with the bank, and also that the declaration shall be sworn to, are different from those before mentioned.

The general Banking Act (*supra*), assented to on the same day as this, does not require the deposit of the original probate or letters of administration. And generally an authenticated copy or official certificate under the seal of the Surrogate Court, is considered sufficient.

The executor or administrator will find it necessary to retain, if possible, the original letters probate, or letters of administration, in his own possession, ready to be produced in Court, or elsewhere, as occasion may require, during the continuance of his office.

Executor or Administrator should keep original letters

The "Canada Joint Stock Companies Act, 1877" (40 Vict., c. 43) contains special provisions as to cases in which shares are transmitted by the death of any shareholder; for the transfer of shares of a deceased member by his personal representative; and that every executor, administrator, curator, guardian, or trustee, shall represent the stock in his hands at meetings and vote as a shareholder; but they are not to be personally subject to liability as shareholders (*Secs. 46-49*). And section 76 provides that proof of any matter necessary to be made under the Act, may be made by solemn declaration under 37 Vict., c. 37, or by affidavit before any justice of the peace, or commissioner for taking affidavits, or any notary public, who are thereby authorized and empowered to administer oaths and receive affidavits and declarations for that purpose.

Canada Joint Stock Companies Act.

Executor, &c., to represent stock.

NOTE.—To an action by the administrator of the deceased depositor against a bank for amount of deposit, it is no defence that the depositor in his lifetime endorsed and delivered the deposit receipt to another person, and that the bank upon presentation of the receipt, and without notice

Bank improperly paying deposit.

of the death, paid the amount to such person ; neither would such a plea be a good defence in equity, for it alleged neither an equitable assignment of the receipt or of the money secured thereby, nor a *donatio mortis causa* (*Lee, Administrator, etc. v. The Bank of B. N. A.*, 30 C. P. 255).

CHAP. II.

COMPENSATION OR ALLOWANCE TO EXECUTORS, ADMINISTRATORS, ETC.

R. S. O., c. 107 s. 41. The Judge of any Surrogate Court may allow to the executor or trustee (a) or administrator, acting under will or letters of administration, a fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the executorship, trusteeship, or administration of the estate and effects vested in him under any will or letters of administration, and in administering, disposing of, and arranging and settling the same, and generally in arranging and settling the affairs of the estate, and therefor may make an order or orders from time to time, and the same should be allowed to an executor, trustee, or administrator, in passing his accounts (R. S. O., c. 107, s. 41).

Allowance to Executors, &c.

On passing accounts.

A Judge of the Court of Chancery may settle the amount of such compensation upon an application to him for that purpose (*Ib.*, sec. 38).

Allowance. The allowance is to be a fair and reasonable allowance.

How ascertained. There is no fixed percentage, but the Judge takes into consideration the "care, pains, trouble, and time expended in administering and disposing of, and

(a) *As to Guardians, see R. S. O., c. 132, s. 3.*

generally in arranging and settling the affairs of the estate."

If viewed as a percentage on the amount passing through the hands of the executor or administrator, the percentage would generally be less in proportion to such amount in the case of large estates, than it would be in small estates.

The allowance is usually fixed at the time of When fixed. auditing and passing the accounts, as to which *vide post*.

Five per cent on sums passing through the hands ^{5 per cent.} of executors, without complication, was considered by the Court of Chancery an excessive allowance in the case of *Thompson v. Freeman* (a).

When a suit for the administration of an estate is pending in the Court of Chancery, it is improper for the Surrogate Court to interfere by ordering the allowance of a commission to trustees or executors (b).

In *McMillan v. McMillan* (c) executors were held entitled to compensation under the Surrogate Act for services performed before the passing of the Act; ^{2½ per cent.} and 2½ per cent. allowed.

The old rule as to compensation of trustee has only been abrogated by the Surrogate Courts Act so far as relates to trusts under wills (d).

An executor is entitled to retain his commission in preference to claims of creditors (e).

Where a legacy is given to executors as a compensation for their trouble, they are at liberty to claim a further sum under the Statute, if the legacy is not sufficient compensation (f).

(a) 15 Grant, 384.

(b) *Cameron v. Bethune*, 15 Gr. 488.

(c) 21 Gr. 369, 381.

(d) *Wilson v. Proudfoot*, 13 Gr. 103.

(e) *Harrison v. Patterson*, 11 Gr. 113.

(f) *Denison v. Denison*, 17 Gr. 306.

Allowance to
administrator,
&c.

An administrator was allowed 5 per cent. on amount received and paid over, and $2\frac{1}{2}$ per cent. on amount received but not paid over (a).

As to right of administrator *de bonis non* to call the estate of his predecessor to account, see *McLennan v. Heward* (a).

The Court of Chancery will not refer it to the Surrogate Judge to settle the amount of compensation or commission to an administrator, but being seized of the subject matter of litigation will finally dispose of the rights of all parties (b).

Executor, &c.,
not to apply
to Chancery
unnecessarily.

On the other hand, where the Surrogate Court had fixed the allowance, and the parties being dissatisfied, applied to the Court of Chancery for an increased allowance, that Court (Proudfoot, V. C.) refused to interfere (c).

An executor or administrator has no right to file a bill in Chancery merely to obtain an indemnity by passing his accounts under the decree of the Court. There must be some real question to submit to the Court, or some dispute requiring interposition; when he will be entitled to his costs, otherwise he will not receive them. And if it should appear that his conduct has been *mala fide*, or unreasonable, he will be ordered to pay the costs of the defendant (d).

Executors in this Province have no right to leave the administration of the estate to, or have the accounts taken by that Court, without some special necessity, where the estate is small, so that the costs of an administration suit would bear a considerable proportion to the amount (e).

(a) 9 Gr. 178, 279; see also *Vanston v. Thompson*, 10 Gr. 542.

(b) *Ibid.*

(c) *Re Estate of Frederick Wells, deceased*, (Co. York), 3 Dec. 1878.

(d) *White v. Cummings*, 3 Gr. 602; *Barry v. Barry*, 19 Gr. 458.

(e) *McGill v. Courtice*, 17 Gr. 271.

CHAP. III.—SECTION I:

PROBATE.

The probate of a will is the approbation of such ^{Probates} will under the seal of a Probate or Surrogate Court after it has been proved by evidence to the satisfaction of such Court.

Probate has a twofold office, which, besides granting administration, authenticates the will, and is evidence of the character of the executor (a).

In ordinary cases there were two modes of proving a will—viz., *in common form*, and *in solemn form*, and these are continued by the Surrogate Courts Act, as they were by the E. C. P. Act.

The probate of a will of personalty, whether granted in common or solemn form, is a judicial act, and as ^{of wills of personalty,} a judgment *in rem* is, while unrepealed, conclusive against all the world; provided that the Court has jurisdiction over the subject matter, and that the probate is not obtained by fraudulent collusion (b).

The jurisdiction of the Ecclesiastical Courts was confined to the probate of instruments relating to personal property. They had no power to compel ^{not of wills of realty.} probate of wills relating exclusively to real estate (c).

In the goods of John Bootle (d), Sir J. Hannen said:—"This was an application to admit to probate a will relating wholly to real property. The principle has been well established, that this Court

(a) *Matson v. Swift*, 8 Beav. 368.

(b) *Duchess of Kingston's Case*, 2 Smith's L. Cases, 7th Ed. 760, 802; *Harrison v. Mayor, &c., of Southampton*, 4 De G. McN. & G. 137. But the Court of Chancery in this Province has power to entertain suits as to the validity of wills, whether probate has been granted or not, and if granted, whether revoked or not. *Vide ante* p. 13.

(c) *Natter v. Brett*, Cro. Car. 395.

(d) 3 L. R. P. & D. 177.

has no jurisdiction in such a case," and refused the application, citing the case of *Drummond* (a), in which Sir Cresswell Cresswell held that it was contrary to the practice of the Court to make such a grant.

Will of lands. Lord Ellenborough in the case of *Doe ex. d. Ash v. Calvert* (1810) 2 Camp. K. B. 389, remarked as to a will of lands, that the Ecclesiastical Courts had no control over it, and refused to receive the letters probate under seal of the Court as secondary evidence of the will; while at the same time parol evidence of the contents of such a will given by a witness who had heard it read over before the testator's family on the day of the funeral would have been admissible, on proof of the will itself being lost (*Ib. in note*).

The observations in Mr. Horsey's valuable treatise are instructive in this connection. He says (p. 124) that "strictly speaking, only those wills which supersede the authority of the ordinary to grant administration require to be proved. Probate was in fact the acknowledgement by the ordinary that his authority to grant administration did not exist. This was the origin of the jurisdiction, for, as in ancient times, he had a personal interest in the effects of those who died intestate, it was thought just and natural that the will of the deceased should be proved to the satisfaction of the prelate whose right was effectually superseded thereby (see 2 Black. Com. 494.) As a general rule those wills which require to be brought into the Court are such as can operate upon the personal estate of the deceased, or on the personal estate over which he had the power of appointing by will (Sug. Pow. c. 5, p. 58). This rule therefore renders it unnecessary to prove wills which relate solely to lands in which the testator had an in-

(a) 2 Sw. & Tr. 11.

terest of freehold (Swinb. pt. 6, s. 11 ; Toller. 69). And although such wills direct that the lands shall be sold and the proceeds distributed as personalty, yet probate is not necessary, neither is probate duty payable in respect of the proceeds."

In the case of *Jane Barden* (a) there was a will of real estate only, which was given to the executors with directions to convert the same into personalty, and on motion for a grant there was a suggestion that the Court of Probate might take notice of the doctrine of equitable conversion, and make the grant on that ground ; but counsel making the suggestion (Dr. Swabey) admitted that he was unable to cite any case in which the doctrine of equitable conversion had been recognised as giving the Court of Probate jurisdiction over a will limited to real property, and the Court (Sir J. P. Wilde) would not then, for the first time, give it that operation and refused the motion (b).

Equitable conversion.

But the E. C. P. Act, s. 61-3, enabled that Court to establish a will against persons interested in the real estate, by its decree in a contentious suit or matter, to which provision sec. 49, S. C. Act in part corresponds,—empowering the Surrogate Court to cite the heir at law, devisee, or other person interested in the real estate to see proceedings. *vide ante*, p. 44 (c).

Will of realty provable on citing heir at law.

In other respects it would seem the jurisdiction *quoad* this subject remains as before the Act.

If there be a doubt whether a will of real estate affect personal property also, it is the safer course to admit it to probate. If it does not evidently appear

(a) L. R. 1 P. & D. 325.

(b) Courts of Equity are Courts of construction in contradistinction from a Court of Probate (Williams on Exors. 6th Ed. 282-3).

(c) In the State of New York probate of a will of real estate is only *prima facie* evidence of the validity of the will which may be impeached by the heirs in an action—*Bailey v. Stewart*, will of A. T. Stewart, 2 Redfield, N. Y. 212.

to be a paper only applying to a freehold estate, it is the duty of the Court to establish it (a).

If executor is appointed, will provable. If an executor be appointed the will is proveable though it dispose only of realty (b).

In *Elizabeth Jordan* the testatrix died in 1867, leaving a will disposing of realty only, and containing an appointment of an executor. On motion for administration with will annexed, to the next of kin, the executor having renounced probate, Sir J. P. Wilde said, "I think the next of kin is entitled to the grant. The general principle is laid down in Williams on Executors, Part 1, Bk. 3. p. 218, 6th Ed. — "the bare nomination of an executor without giving any legacy, or appointing anything to be done by him is sufficient to make it a will, and as a will it is to be proved"; if the nomination of the executor made it a will, the fact of his subsequent renunciation cannot take away the effect of the nomination. The principle laid down by Mr. Justice Williams was affirmed by Sir C. Creswell in *O'Dwyer v. Geare* (1859) 1 Sw. & Tr. 465."

The case of *Jane Burden*, *supra*, is apparently *contra* on this point, *vide* Coote 8th ed. p. 41; but *Elizabeth Jordan* is the later case and would seem to be decided upon consideration of undoubted authority not referred to in *Jane Burden*.

And if a person has by will exercised a power of appointing personal estate, such will should be proved although the deceased died possessed of no property of his own (c).

Revocatory paper.

A paper simply revocatory should be proved (d), and if after probate the executor discover subse-

(a) *Thorold v. Thorold*, 1 Phill. 1; *Durken v. Johnston*, *ib.* p. 8 n.

(b) *Leese*, 31 L. J., P. & M. Pt 3, p. 169, and *Elizabeth Jordan*, L. R. 1 P. & D., 555 (Jan'y, 1868).

(c) Coote, 8th ed., 37; and D. & B. 345.

(d) *Brenchley v. Still*, 2 Rob. 162; *Brenchley v. Lynn*, *ib.* 441.

quent testamentary paper, he ought to bring it into court, even though it be merely confirmatory of the will already proved (a).

A paper neither dispositive nor revocatory cannot be admitted to probate, unless it be incorporated by *express* reference in a paper of a testamentary character (b).

Nor can probate be compelled of a will which is confined to the appointment of a guardian (c).

Will appointing guardian only.

Section 22 of the Wills' Act must be complied with in the revocation of a will, to make such revocation effectual, otherwise the will may be admitted to probate. *Vide* section 8 of that Act as to the application of section 22.

Revocation of Wills.

A testator drew his pen through the lines of various parts of his will, wrote on the back of it "this is revoked," and threw it among a heap of waste papers in his sitting-room. A servant took it up and put it on a table in the kitchen. It remained lying about in the kitchen till the testator's death, seven or eight years afterwards, and was then found uninjured. Held, that the will was not revoked, the words "or otherwise destroying" in 7 Wm. 4, & 1 Vic. c. 26, s. 20, (sec. 22, Wills Act, Ont), not being satisfied; as, whatever the testator intended, the will had not been actually injured (d).

Probate of will intended to be revoked.

It is not necessary that a paper should be testamentary on the face of it, or that the execution of a will should have been in the contemplation of the testator.

Papers not in form testamentary.

If there be any proof in the paper itself, or from clear evidence *dehors* that it would convey the be-

(a) *Weddall v. Nixon*, 17 Beav. 160.

(b) *Taylor v. D'Egville*, 3 Hagg., 202; *Griffin v. Ferrand*, 1 Curt. 97.

(c) *Gilliat v. Gilliat*, 3 Phill. 222; *Morton deceased*, 33 L. J. P. & M. 87; *Lady Chester's case*, 1 Vent. 207.

(d) *Cheese v. Lovejoy*, 2 P. D., 251, and see *Ince*, ib. 111.

nefit which would be conveyed by it if considered as a will, and that death is the event that is to give effect to it, then whatever its form, it may be proved as testamentary (*a*).

Deeds, marriage articles, &c.

Deeds indented, and poll, marriage articles, powers of attorney, bonds, bills, notes of hand, cheques on bankers, endorsements on bonds and bills, stock receipts, letters, memoranda, and even under special circumstances (*b*), drafts of bonds, have been holden to be testamentary. In short there is scarcely any paper which, regarded as to its form only, may not be admitted to probate, provided, of course, it be executed in the manner which the law prescribes for the execution of testamentary papers (*c*).

Intention.

In deciding a point of this nature the Court looks to the intention of the writer and not to the form of the instrument (*d*).

The Court may admit part of an instrument to probate and reject the rest (*e*).

Coercion.

In *Piercy v. Westropp* (*f*) a portion of the will which had been obtained by coercion was pronounced against, and in *Macquire v. Marshall* (*g*)

Clauses struck out of will.

a bequest was struck out of a will which the legatee had by noise and clamour prevented the deceased from altering. In *Wood v. Wood* (3 Phill. 357), the judge struck the clause out with his own hand.

A clause introduced by fraud has been expunged

(a) *King's Proctor v. Daines*, 3 Hagg., 220; *In Re Nelson, McLennan v. Wishart*, 14 Gr. 199, 512. And parol evidence is admissible to show that a paper is of a testamentary character- *English deceased*, 34 L. J. P. & M. 5.

(b) *Masterman v. Maberly*, 2 Hagg., 235.

(c) D. & B., 159.

(d) *Thorold v. Thorold*, *supra*.

(e) *Allen v. McPherson*, 1 H. L. C. 191, 209; *Nathan v. Moses*, 3 Phill. 529, and see *Smith v. Meriam*, 25 Gr. 383.

(f) *Milw.* 495.

(g) *Milw.* 307; & see *Betts v. Doughty*, 5 P.D. 26.

(a) and a clause inserted in the will by mistake of the writer may be omitted from the probate (b).

In short wherever circumstances, which would invalidate a will altogether, apply to one or more clauses only, those clauses will be omitted from the probate (c).

The Court has also power to exclude any offensive passage from the probate and from the copy preserved in the registry (d).

Ecclesiastical Courts have gone the length of adding to the contents of a will when satisfied that the intention of the testator has not been fully expressed by it. As to the principle upon which they proceeded see *Fawcett v. Jones* (e). Omissions supplied.

SECTION II.

WILLS OF SOLDIERS AND MARINERS.

By section 14 of the Wills Act:—"Any soldier being in actual military service, or any mariner or seaman, being at sea, may dispose of his personal estate as he might have done before the passing of this Act." This section follows, verbatim, section 11, Imperial Wills Act. Wills of Soldiers and Mariners.

The origin of the exemption in favour of the class of persons mentioned, and the construction of the section is considered in the judgment of Sir H. Jenner Fust in *Drummond v. Parish* (f), from which the following quotation is made:—"It must be Exempt from compliance with formalities of Wills Act.

(a) *Harrison v. Stone*, 2 Hagg. 549 *Plume v. Beale*, 1 P. Wms, 388.

(b) *Duane deceased*, 30 L. J. P. & M. 173.

(c) *Haddock v. Trotter*, 1 Fost. & F. 31.

(d) *Wartnaby*, 1 Rob. 423.

(e) 3 Phill. 434.

(f) 2 Notes of Cases, 318.

Wills of soldiers and mariners.

remembered that the exception was made at the time when the Statute of Frauds was passed (1676), and must be considered with reference to the circumstances of that time, for the 11th section of the present Act (the Imperial Wills Act) is only a continuation of the privilege granted to soldiers and mariners in the time of Charles II.; and that before the Statute of Frauds a will might not only be made by word of mouth, but the most solemn will might be revoked by word of mouth, and by any person above the age of fourteen years(a). A will executed in the presence of witnesses might be revoked by parol." The Court "had been referred to the Life of Sir Lionel Jenkins, who claimed some merit for having, in the preparation of the Statute of Frauds, obtained for the soldiers of the English army, and mariners of our navy, the full benefit of the testamentary privileges of the Roman Law, and an exemption from the necessity of executing a will in writing. The exemption had avowedly been borrowed from the Roman Law."

In the United States.

A like privilege is enjoyed by soldiers and mariners, under the laws of certain States of the American Union.

In *ex parte Thompson* (b), the learned judge (Bradford, Surrogate, Co. New York), referring to American and English authorities, remarked that, "the provisions of the Statute of Frauds was not applied to nuncupations made by soldiers or seamen in actual service. A similar exception is made in our own Statutes respecting wills."

(a) Jarman, 3rd ed., 28; D. & B. 219.

(b) 4 Bradford, N. Y., 154; see also *Warren v. Harding*, 2 R. I. Rep. 123; *Lucas v. Goff*, 33 Miss. 629, & *Kent's Com. Am. Law*, p. 517.

And Mr. Smith (a), citing *Hubbard v. Hubbard* (b) and *re Arthur White* (c), says: "The rule governing the only unwritten wills now recognised is the Common Law as it stood before the passing of the Statute of Frauds."

A distinction was recognized from a remote period, Distinction. and anterior to the Statute of Frauds, between the unwritten wills of soldiers and all other verbal testaments; the former being denominated *military* wills and the latter *nuncupative* wills (Swinb., pt. 1, §§ 12, 14).

The effect of the Wills Act is to take away the power of making nuncupative wills, except in the Effect of Wills Act. cases to which the exempting section applies (d).

There is no limit to the amount of personal property a soldier or mariner may dispose of under section 14; and it is important to consider under what Personalty which may devolve, unlimited. circumstances such dispositions can be admitted to probate.

If not admitted, the estate will go as in the case of intestacies, and the intentions of the deceased may thereby in some instances be defeated.

The same observations which apply to wills of personal property in England made previously to 1st January, 1838 (in Ontario, 1st January, 1874), apply equally to those wills excepted by the Act from its general operation, and as to which the Sta-

(a) Smith's Probate Law (Boston, Mass.), p. 55.

(b) 4 Seld., N. Y. Appeals R. 196.

(c) 22 L. R. 110.

(d) NOTE.—As to what constituted a good nuncupative will, see Swinb., pt. 1, s. 12, and pt. 4, s. 29; *Hubbard v. Hubbard*, *supra*; *Sampson v. Browning*, 22 Georgia, 293; and the Clerk's Instructor in Ecclesiastical Courts, by a gentleman of Doctors Commons, Fleet Street, London, A.D. 1740; Bacon's Abr. Wills, D. and Walkern on Wills, p. 218, and appendix. An instance of a nuncupative will being admitted to probate was that of *Ulrich Howard*, deceased, Surr. Court, Home District, U. C., 30 March, 1832. And in same Court, *Collins*, Sept., 1839, and *Ritchie*, March, 1850.

The privilege
confined to
soldiers in
service, or
seamen at sea.

tute has left the old law unaltered (a). The privilege is confined in the case of soldiers, to such as are in actual military service (b), and in the case of mariners or seamen (c) to those who make their wills at sea.

Drummond v.
Parish.

In *Drummond v. Parish*, *supra*, it was shown that the deceased, Major-General Drummond, Director of the Royal Artillery, was resident at Woolwich, and the Court rejected an allegation propounding an informal testamentary paper, on the ground that the deceased was not "in actual military service" within the meaning of the exception in the Act.

Shearman
v. Pike.

In the case of *Shearman v. Pyke* (d), the will was purely nuncupative. The testator died in hospital at Moco Moco in 1721, the naval expedition in which he served not being over. In his last illness he was asked by J. P. and M. S. to make his will, and he replied, "I give all I have to my master, and I will give nothing from him, and I'll make no other will; he may dispose of it as he pleases." Two days after the death, the witnesses signed a schedule of the contents of the will, and made oath thereof at Moco Moco. One of the witnesses died on the voyage. The will was propounded by Governor Pyke (the testator's master) as a nuncupative will, and opposed by

Service of E.
I. Co.'

Actual
service.

(a) Coote, 8th Ed. p. 94, citing *Neville*, 4 Sw. and Tr. 218, and *Farguhar*, 4 N. C. 651.

(b) *Drummond Parish supra*; *re Norris*, 3 N. C. 197; *Herbert v. Herbert*, 1 Dean Eccl. R. 10; *Phipps* (A.D. 1840), 2 Curt. 369; *Hill, deceased*, 4 N. C. 174; 1 Rob. 276; *Churchill, deceased*, 4 N. C. 47; *Donaldson, deceased*, 2 Curt. 386; *Neville*, 4 Sw. and Tr. 218.

(c) *Milligan, deceased*, 2 Rob. 108; *Morrell v. Morrell* (1827), 1 Hagg. 51; *Lay, deceased*, 2 Curt. 375; *Austen, deceased*, 2 Rob. 611; *The Earl of Eusten v. Lord Henry Seymour*, [2 Curt. 339; *Hayes*, 2 Curt. 338; *Corby, deceased*, 18 Jur. 634; *Saunders, deceased*, L. R. 1 P. & D. 16, and 14 W. R. 148.

(d) 2 N. C. 334 (A. D. 1724). *Donaldson, deceased, supra*, the testator, was in the E. I. Company's service.

Shearman, one of the next of kin, but after argument on both sides the will was pronounced for.

Where a will made by an officer whilst engaged in actual military service was signed by him, but not attested, the Court required that there should be an affidavit of two disinterested persons, stating in terms the signature to be in his handwriting, and that the form given in the rules should be strictly followed. (For Form see Appendix.)

Neville's case.
Military will.

Two disinterested witnesses.

This was the case of *Glastonbury Neville* (4 Sw. & Tr. 218), late a Lieutenant in the Royal Engineers, who was killed in action January 31, 1858, at Barodia, in the East Indies. While serving in the Crimean War, in 1855, he had made a will and codicil. The will, commencing "Camp before Sebastopol, April 2nd, 1855," was written on three sides of a sheet of note-paper, with the testator's signature at the end of the second side, but not at the end of the third side. On the fourth side was endorsed, "My will, G. Neville, April 2nd, 1855." The codicil folded on the fourth side, and was dated June 7th, 1855, but was unsigned. Administration with the will annexed was granted in March, 1859, to a legatee on the practice above referred to being complied with.

The case of *Farquhar, deceased* (a), was that of a soldier who was a minor, and being mortally wounded wrote his will in pencil on the field of battle, and the surgeon alone attested it. The question was whether this was a valid will, and Sir H. Jenner Fust held that as he might, according to the Statute of Frauds, have made such a will and even a nuncupative will, whether major or minor, it was under the 11th section of the (Imp.) Wills Act, a good and valid will.

Will of a soldier, a minor.

An officer in the Queen's army, with his regiment, in barracks,

(a) 4 N. C., 651.

not actual
service.

Milligan's
case.

Mariner's will
made at sea.

McMurdo's
case.

in barracks in a British colony is not "in actual military service" within the section referred to (a).

In *William Milligan* (b) the testator was master of a merchant vessel, and died at sea in May, 1849. He wrote, addressed, and sent by post to his wife, a letter purporting to contain his will, which she received, bequeathing to her all his property, but appointing no executor. The letter was proved to be in the handwriting of the deceased. It was headed "Margate Roads, 5th August, 1848," and commenced, "My dear Margaret,—Thus far on my journey. It is now blowing a strong gale. Life is uncertain. In the event of we being parted for ever in this world, I wish you to have, and bequeath, everything that I am possessed of, goods, money, ships, or land, or all debts due me, or all moneys coming by any way whatsoever. I have not made any will," &c. The letter was signed by deceased, but not attested. No other paper of a testamentary nature was found. It was held to be within section 11 of the Wills Act, and that there were dispositive words in the paper. It was admitted to proof, and administration, with the will annexed, was granted to the widow, justifying security not being required as the parties cited (brothers) had not a prior claim to the grant.

In *McMurdo* (c) a will made by a mariner serving on board H. M. S. "Excellent," she being permanently stationed in Portsmouth harbour, was on a motion for revocation of letters probate which had been granted by the Prerogative Court, held to be the the will of "a mariner or seaman being at

(a) *Whyte v. Repton*, 3 N. C., 97 (A.D. 1844); *Norris, deceased*, 1b. 197.

(b) *Milligan, deceased*, 2 Rob. 108, (A.D. 1849).

(c) L. R. 1 P. & D. 540 (A.D. 1867).

sea," within the exemption of the Statute, and the motion rejected.

In the case of *Henry Corby* (18 Jur. 634), an able Corby. seaman on board the ship "J. A." at Melbourne, Australia, application was made for probate of certain informal papers (letters), under section 11, the evidence showed that the vessel was in port, and although the letters were written on board, she did not sail for fifteen days after they were written. Dr. Lushington refused the motion on the ground that the case did not come within the words "mariner or seaman being at sea."

The nuncupative will of an officer of the U. S. Navy in command of the gunboat "Benton," made while the vessel was lying opposite Vicksburg in the Mississippi River was held not entitled to probate, not having been made "at sea." (*Gwin*, 1 Tucker, Surr. Rep., N. Y., 44). But a similar will of the master of a ship made on board while she was at anchor in an arm of the sea where the tide ebbs and flows, was admitted (*Hubbard v. Hubbard, supra*).

In some of the cases referred to, *e. g. Shearman v. Pyke, Euston v. Seymour*, and *Morrell v. Morrell*, the will was purely nuncupative; in others written but unattested; in others attested by only one witness

No particular form of words are necessary, and no particular number of witnesses is required provided the proof be sufficient to satisfy the Court as to the substance of the testamentary request or declaration (a). As to form.

Where no executor has been named, administration *cum test. annex.* is granted as in cases of other wills where no executor has been appointed (b). Practice if no executor.

(a) *Ex. p. Thompson*, and *Hubbard v. Hubbard, supra*.

(b) *Vide cases of Morrell, Neville, and Thorne, supra*.

Will of soldier
or mariner,
how estab-
lished.

When it is sought to establish an informal will on the ground of the testators having made it while in actual military service; or, being a mariner, while at sea, an affidavit of the facts on which the privilege depends, and setting forth the expedition on which the testator was engaged must be filed (a).

A schedule containing the words of the testator as uttered by him, as in the case of *Shearman v. Pyke*, or the informal papers containing the will must be marked and filed. In that case it would appear that the words had been reduced to writing and subscribed by the witnesses, who two days afterwards deposed to it before some person authorised to administer oaths.

Blind or illit-
erate persons.

Probate was allowed to pass in common form on affidavit from a clerk in the War Office that the parties deceased were at the time their wills were made in actual military service (b).

The nuncupation is reduced to writing at the hearing in the form in which it may be established by the evidence (c).

The other proceedings are those in the ordinary cases before the Wills Act.

The practice as to wills of blind or illiterate persons applies to these wills, viz., that probate of the will, or administration with the will annexed of any blind, or illiterate, or ignorant person, is not allowed to issue, unless the Court is satisfied that the said will was read over to the testator before its execution, or that the testator had at such time knowledge of the contents (d).

(a) *Thorne*, 4 Sw. & Tr. 36.

(b) 2 Curt. 268, n.

(c) *Smith's Probate Law*, *supra*, and authorities cited.

(d) *Thorne*, 4 Sw. & Tr. 36. *Hackett*, 4 Sw. & Tr. 220.

Wills of Married Women.

The devise or bequest which a married woman might make under 22 Vic. c. 34, s. 16 (R. S. O. c. 106, s. 6.) required to be executed in the presence of two or more witnesses, neither of whom was her husband. How executed between 4 May, 1859, and 1 Jan, 1874.

By the Wills Act, section 9, s.s. 4, the words "person" and "testator" include a married woman, who may therefore devise, bequeath, or dispose of her property by will (sec. 10). Wills Act.

Among the rights incident to separate property of married women is the right of bequeathing it (a).

Such wills are admitted to probate (b).

In the case of *Adams v. Corcoran* (c), probate of the will of a married woman living separate from her husband had been granted, and it was said that the husband might have appeared and opposed probate in the Surrogate Court, as in *Paglar v. Tongue* (L. R. 1, P. & D. 158). Married woman living separate.

In the executor's or administrator's oath on application for probate or administration, a divorced woman is described by the name by which she was known at the time of her death (d). Divorced.

SECTION III.

Probates.

The probate granted to executors whose appointment is general and absolute is also itself general and absolute in its powers. It extends over all per- Executors.

(a) *Hadden v. Fladgate*, 1 Sw. & Tr. 52 (A. D. 1858). (b) *Ibid.*

(c) *Per Hagarty, J.*, 25 C. P. 254.

(d) *Hey*, 35 L. J. (N. S.) P. & M. 3. ; 1 L. R. P. & D. 51.

Probate general. sonal estate situate in Ontario, and does not terminate even necessarily by the death of the executors, but may be continued, as we shall see, to an indefinite period, by the chain of executorship.

An executor is either nominated or appointed, in the will, or is executor according to the tenor of the will.

Where persons are appointed to collect the assets and pay the debts and legacies of the testator, they are executors according to the tenor, and as such entitled to probate (a).

If a testator give to A. all his real and personal estate to apply the same, "after payment of debts," to the payment of legacies, without expressly nominating him as executor, A. will be executor according to the tenor, and entitled to probate (a).

Executor potiore jure. An universal legatee is not an executor as such (b). It is obligatory on the Court to grant probate to the executor (b), except under special circumstances referred to in S. C. Act, sec. 54.

Probate is granted to one executor on the renunciation of the others.

Probate is granted to all the executors, no matter what the number may be.

Indefeasibility of his title. The executor's title is not defeasible by bankruptcy, insolvency, or even felony (c).

Accordingly, where an executor (being residuary legatee) cut off a part of a will containing legacies, and thereby attempted to put £500 into his own pocket, and which attempt at fraud he admitted, the Court had no option but to decree probate to him with his co-executor (d).

The general indefeasibility of the executorship

(a) *William Bell*, 4 L. R. P. D. 85.

(b) D. & B. 339; *T. H. Oliphant*, 1 Sw. & Tr. 526.

(c) *Smethurst v. Tomlin*, 2 Sw. & Tr., 143-147.

(d) *Mary Hill*, 6 Jurist, 350.

has been broken into, in a small degree, by the 54th section of the S. C. Act. By that section an executor may be passed over, if he be resident out of Ontario at the time of his testator's decease, and there shall appear to the Court to be a necessity for or a convenience in making a grant of administration (with the will annexed) to some other person. Special circumstances, 54th Section S. C. Act.

With this exception, lunacy, idiocy, and mental imbecility, are the only grounds upon which an executor may be excluded from probate (a).

The executor has either been expressly nominated by the testator, or the latter has, by his will, authorized another person to make that nomination on his behalf (b).

If a corporation aggregate be appointed executors, administration (with the will annexed) will be granted to their syndic (c).

If the will exist in duplicate, the executors may prove one part, and the other part should be filed in the registry. The registrar will inquire if both parts were in existence at the time of the testator's death, and should one of them not be forthcoming its absence will have to be accounted for. (Coote, p. 50). Duplicate will.

If there be a codicil or codicils, such codicil or cils must be proved with the will. Codicils proved with will.

There is an exception to this rule where a codicil is litigated, which in no way alters the appointment of executors, and where there is a necessity or a reason for administering the estate *sub modo* without delay (d). Exception:

In such cases probate is granted of a will alone to

(a) *Evans v. Tyler*, 2 Rob., 131; and *vide* "Grant's for use and benefit," *post*.

(b) *Cringan*, 1 Hagg. p. 548, and *Jackon v. Paulet*, 2 Rob. p. 345; see also *A. H. Ryder*, 2 Sw. & Tr., p. 128.

(c) *E. Darke*, 1 Sw. & Tr., p. 517.

(d) *Reay v. Coucher*, 2 Hagg. p. 249 & *Coote*, 50.

Probate of will without litigation. Probate of will the executors therein named, the question of the validity of any codicil thereto being reserved. Such a probate of course does not empower the executor to distribute the residue of the estate (a).

Power reserved to other executors to prove. If there be several executors, one may prove alone, without notice to the others, and in this case a power is reserved by the court to grant probate to the latter whenever they or any of them shall duly apply for the same.

But this reservation of power can only be made to an executor who is equal in degree. Therefore when an executor for life takes probate, power is not reserved to the executor substituted upon his decease.

Double probate. The executor to whom this power is reserved may at any time, either during the lifetime or after the death of the other executor, prove the testator's will.

The grant is called a *double* or *treble* probate (1).

Feme executrix taking probate. When a *feme covert* is appointed an executrix of a will, she is allowed to take probate without notice to her husband as it is not the practice to require his consent (b). But where a husband dissented, the court excluded a *feme covert* executrix, and granted probate to her co-executor without her (c).

Probate refused on husband dissenting. If the will have been previously proved and deposited in the Court of another jurisdiction, it is competent to the executor to prove an authentic copy, Probate of authentic copy of will or exemplification.

Probate duties in England (1) NOTE.—The Imp. Stat. 41, Geo. III. c. 86, provides that duties shall not be payable in respect of grants of probate, and other grants, more than once on the same estate, a denoting stamp merely being affixed to the double grant. There is at present no similar provision in Ontario.

as to double probates.

(a) Vide "The Law Magazine and Law Review," November, 1857, p. 101.

(b) *Dye, deceased*, 2 Rob. 342.

(c) D. & B. 340. *Williams on Executors*, 8th Ed. 236-456, & *Coote*, p. 51, & *Balsam v. Robinson*, 19 U. C. C. P. 266.

i. e., an exemplification or office copy, *loco originalis*.
Cooté, 52.

The Court is accustomed to call for evidence (by affidavit) in support or elucidation of a will, if it suspects a defect in its execution, or if there be interpolations, erasures, or alterations not sufficiently attested, *vide post*.

It is most usual for the Court to grant probate of the will latest in date; but if the parties interested under such will have been cited to propound it, and do not do so, the Court grants probate in common form of the one preceding it in date (a).

Probate of earlier will.

If a codicil have been discovered at a period subsequent to probate of a will being taken, a separate probate for that codicil will be granted to the executor, provided it in no way repeals or alters the appointment of executors already made in the will (b). If different executors are appointed by the codicil, the probate of the will must be brought in and revoked, and a new probate will be granted of the will and codicil together (c).

Codicil discovered subsequently to probate of will appointing different executors.

The probate does not necessarily expire with the death of the grantee. An executor having taken probate of his own testator's will becomes executor, *ipso facto*, not only of that will, but also, and without further grant, of the will of any testator, of whom the other was sole or surviving executor (d), and so on, *ad infinitum*, upwards (e).

Transmission of Executorship.

The office of executor is transmissible downwards equally, *ad infinitum*, provided the same condition

(a) *Palmer v. Dent*, 7 Notes of Cases, 555.

(b) *Langdon v. Rooke*, 1 Notes of Cases, 254; *Wm. Beeton*, 6 Notes of Cases, 13.

(c) *Vide post*, "Revocations."

(d) *Wms. on Executors*, 8th ed., 258. In *Re De La Ronde*, 19 Gr. 119; and *Allen v. Parke*, 17 C. P. 108.

(e) *J. Perry*, 2 Curt. 655; *Wankford v. Wankford*; 1 Salk. 309 *Chapman v. Dalton*, Plowd. 286; *Barnsby v. Grantham*; *Ibid*, 525.

If Probate taken. be observed, viz., that his executor make a will which shall afterwards be duly proved.

In each case the chain of representation is carried up or handed down, not only in the case of a sole executor, but of many.

But an executor who has not proved the will cannot transmit the representation (a). Nor will he be allowed to renounce execution of the first will and take probate of the latter alone (b).

Transmission of executorship of will of *feme covert* downwards. The executorship of the will of a *feme covert* (made under a power, or with the consent of her husband) may be carried *downwards from her*, through her executor, to the same extent and under the same conditions as any other executorship (c).

Transmission of executorship through *feme executrix* upwards. The chain of executorship is also extended *upwards, through the medium of a feme covert executrix* has made her will by the common law and has appointed an executor *jure representationis* for the purpose only of continuing the chain of representation (d).

But in order to perfect the chain through a *feme executrix*, the probate which shall have been taken of her will must contain an express limitation referring to the testatrix's executorship (e).

In this connection it may be remarked that the testamentary capacity of a married woman was not enlarged by the Imp. Wills Act, as it is by the Wills Act of Ontario, *vide ante* p. 196). The status, however of a married woman as to her power to assume

(a) D. & B. 320; *Isted v. Stanley*, Dyer 372; and see Coots 58.

(b) *J. Perry*, *supra*.

(c) Coots p. 58, cit. *R. Beer*, 2 Rob. p. 349.

(d) Coots p. 58, cit. *Birkett v. Vandercom*, 3 Hagg. 751; *Barr v. Carter*, 2 Cox, p. 429; *Scammell v. Wilkinson*, 2 East, p. 558; *Stevens v. Bagwell*, 15 Ves. pp. 155, 156; *Rachel Bayne*, Weekly Reporter, August 7, 1858, p. 815; 4 Sw. & Tr. 210.

(e) Williams's Law of Executors, part 1, book 2, chap. 1, sect. 2; and book 3, chap. 4.

or transmit the office of executrix or administratrix would seem to remain as at common law (a).

It is not clear whether an executor, proving by his attorney, continues the chain of executorship or not (b); but it seems consonant to law that this should operate as transmitting it.

If the executor be appointed for his life, his office is not transmissible to his own executor; and the same observation applies to the case where an executor is appointed to act only until a specified event or contingency shall take place.

When executorship not transmitted.

It has been said that an executrix appointed during widowhood, and dying a widow, transmits the executorship to her own executors (c). But it seems to be otherwise if she remarry, for as, upon her remarriage, the probate granted to her ceases, she has then no power of transmitting the executorship (d).

The right of transmission is in the proving executor, or the survivor of the proving executors, and the renunciation of the actual survivor who has not proved has the same effect whether it be made after the death or in the lifetime of the proving executor or executors (e).

The transmission of the executorship is usually evidenced by the existence and production only of each independent probate. But the court will by way of confirmation of title grant administration with the will annexed of a remote testator to an executor to whom the representation has been transmitted, and this it would appear was at one time a common practice (f).

Transmission of executorship, how evidenced.

(a) *John Hughes*, 4 Sw. & Tr. 210; see "Limited Probates," *post*.

(b) *William Bayard*, 7 Notes of Cases, p. 118, and 1 Rob. 770.

(c) *Bond v. Fuikney*, 2 Lee, p. 371; *Sed. vide* D. & B. 32, 1 m.

(d) *Coote*, p. 61.

(e) See sec. 59, S. C. Act, and *R. Noddings*, 9 W. R. 40; and *Coote*, 3d ed. 60; and *Allen v. Parke*, *supra*.

(f) *Thomas v. Baker*, 1 Lee, p. 343; see also *R. Noddings*, *supra*.

SECTION IV.

PROOF OF WILLS.

Proof in detail
of wills.

It will have been seen from what has been stated that the evidence which may be called for by the court, before granting probate of a will of person-

Before or since
Wills Act.

ality, in addition to the adminicular proof referred to at page 37, will, in a general sense, depend,—1st.

Soldier, sailor
or civilian.

upon the fact whether the will or codicil in question has been made before the Wills' Act. 2ndly, If made since the Act,—whether the testator was a soldier, a sailor or a civilian.

The Court may, even in its Common Form Procedure, require direct and specific evidence upon any point or particular which, raising a presumption against the instrument itself or any part of it, or exciting a suspicion in the mind of the Court, calls for rebuttal or explanation (a).

Testamentary
capacity.

By the Wills Act of Ontario "*every person*" may dispose of his estate by *will*; persons under the age of 21 years only excepted. Idiots and persons of non-sane memory excepted by the Statute of Wills. 34th Hen. 8, c. 5, s. 14, and others devoid of testamentary capacity are not, in express terms, excepted by the Will's Act. Nevertheless by the general law, exceptions in cases of such persons exist (b) *ex necessitate*. "By the general rule of law, wills made by lunatics, and *non compotes* generally, persons under the dominion of fear, fraud or undue influence are absolutely null and void" (c).

Persons born deaf, blind and dumb, wanting the common inlets of understanding, are incapable of

(a) Coote, 8th ed., 79.

(b) D. & B. 67 n.; and see Leith's Real Prop. Stat. 283.

(c) Flood on Wills, p. 367; William's Exors. 8th ed. p. 12, et seq., and see Walkem on Wills, Bk. II.

having the *animus testandi*, and their testaments are therefore void (2 Black. Com. 497). Unless a paper propounded as a will has been made by a person of testamentary capacity it is not entitled to probate, for it is no will (*a*).

When however, the *factum* is regular, very slight Presumption. proof of capacity will suffice; and in ordinary cases it is sufficient to prove the execution of the paper as a will (*b*).

It is the presumption of law that every man is of sound mind till the contrary is shown (Sir H. Jenner in *Wellesley v. Vere*) (*c*).

But where a will on the face of it was marked with insanity, and the deceased had died insane, the Court treated it as a case of intestacy; directing however, that the will should be filed in the registry (*d*).

Where a will is not dispositive on the face of it, Characteristics of a will. nor shown to be so by extrinsic evidence, it is not Must be dispositive. entitled to probate (*e*).

And Courts of Probate before making a grant, Death of testator. require, not only that the death should be proved, but that the instrument offered for probate should be such as depends upon the death of the person making it for its force and effect (*f*).

Will depends on death.

"For a testament is of force after men are dead; otherwise, it is of no strength at all while the testator liveth" (*g*).

(a) *The Marquis of Winchester's Case*, 6 Co. 23a; Browne on Prob. 17.

(b) *Burgoyne v. Showler*, *infra*, and D. & B. 68.

(c) 1 No. of Co. 247. See further *Symes v. Green*, 28 L. J. P. & M. 83; *Sutton v. Sadler*, 3 C. B. N. S. 87.

(d) *Bouryet*, 1 Curt. 591.

(e) *Griffin v. Ferard*, 1 Curt. 97.

(f) *Tapley v. Kent* 1 Rob. 400; *Habergham v. Vincent*, 2 Ves. Jr. 232; *Masterman v. Maberly*, 2 Hagg. 247; *The King's Proctor v. Daines*, *supra*; *Robertson v. Smith*, 39 L. J. P. & M. 41; *Nicholls v. Nicholls*, 2 Phill. 180.

(g) *Heb. IX. 17*; *Swinsb. Pt. 1, 3*; *Forse and Hambling's case*, 4 Rep. 61 b.; *Tapley v. Kent*, *supra*.

Revocable
during life.

Hence another essential feature of a will is, that it must in its nature have been ambulatory, or revocable during the life of the testator; for an instrument consummated in the life of the testator, and which he could not revoke while he lived, is not a testament (a).

If a paper purports of itself to be testamentary, the party who opposes its admission to probate, must in order to get rid of it, show to the Court that it was not made *animo testandi*; if the purport be equivocal, it must be shown by the party setting it up, that it was made *animo testandi* (b).

Due execution. If the will is in due form, and duly executed, the Court will hold it testamentary without looking at its contents, even though they are manifestly nugatory (c).

Omnia rite
acta fuisse.

In questions as to due execution Courts of Probate act upon the maxim *omnia presumuntur rite acta fuisse* (d).

In *Burgoyne v. Showler* (e), Dr. Lushington observes—"I apprehend that where a will on the face of it appears duly executed, and there is a clause of attestation of this kind, being not in the strict form, the presumption must be *omnia rite acta fuisse*. However, if the party is put on proof of the will he is under the necessity of producing the subscribed witnesses, and any other evidence, if there be any other, to establish the fact."

(a) *Vynior's case*, 8 Rep. 81; *Swinb.* 7, 1, 2; *Robinson*, 36 L. J. P. & M. 93; *Hobson v. Blackburne*, 1 Add. 274. As to circumstances under which a Court of Equity may hold a will irrevocable, see *Fitzgerald v. Fitzgerald*, 20 Gr. 410.

(b) *Coventry v. Williams*, 3 Curt. 791; *Thornicroft v. Lashmar*, 2 Sw. & Tr. 479; 31 L. J. P. & M. 150, and see *Castle v. Torre*, 2 Moo. P. C. C. 133.

(c) *Roberts v. Roberts*, 31 L. J. P. & M. 46.

(d) *Sir J. Dickson*, 6 No. of Ca. 278; *Vinnicombe v. Butler*, 34 L. J. P. & M. 18. *Stewart v. Lees* 24 Gr. 435; and see *Pool*, 35 L. J. (N. S.) P. & M. 97.

(e) 3 No. of Ca. p. 204, 1844; and see *Prudence*, *ib.* in note.

The evidence required in the Surrogate Courts as to the execution of Wills and Codicils as well, those made before, as those made after the "Wills' Act, 1873,"—is indicated in the Instructions (a) on that subject issued to the Registrars of the Court of Probate in England, under the E. C. P. Act, showing as those Instructions do the practice of that Court ^{5 Dec. 1859.} on that subject, as it stood 5th Dec., 1859.

As to those instructions relating to wills made since the Imperial Wills Act, Mr Coote (8th ed. p. 80) remarks that—"they contain an authoritative exegesis of the law and practice on those points." And Mr. Horsey in his treatise on the Probate Acts, 1857-8, observes that the instructions referred to "are declaratory to a great extent of the effect of the Wills Act; and furnish a general sketch of the evidence required in proving Wills." Practice in proving execution of Wills.

Since the "Wills Act of Ontario, 1873," those instructions have become a guide as to the evidence to be called for in the Surrogate Courts under that Act, although they have not the authority of Rules of Court. They are *mutatis mutandis*, as follows :— Since Wills Act, 1873.

PROOF OF WILLS.

Instructions as to Proof.

"AS TO PROBATE OF WILLS AND CODICILS, AND LETTERS OF ADMINISTRATION WITH THE WILL (OR WILL AND CODICILS) ANNEXED, WHERE THE WILLS AND CODICILS ARE DATED AFTER THE 31ST DECEMBER," 1873. Wills since 31st Dec., 1873.

Execution of a Will.

"If there be no attestation clause to a will or codicil presented for probate, or if the attestation clause thereto be insufficient, an affidavit will be required from at least one Insufficient attestation or absence of

(a) The instructions of 1862, which were substituted for, and vary somewhat from those first issued under the Imp. Wills Act—are those quoted in this treatise as to execution of Wills. For those first issued see 4 Jurist. N. S. Pt. 2, p. 9, 1858.

- “ of the subscribing witnesses, if they or either of them be
 “ living, to prove that the provisions of the Wills Act [sec. 12]
 “ in reference to the execution, were in fact complied with
 “ (a).
 Probate re- “ If, on perusing the affidavits of both the subscribing wit-
 fused if affida- “ nesses, it appears that the requirements of the Statute
 vitinsufficient. “ were not complied with, probate will be refused.
 Or if doubtful, “ If, on perusing the affidavit or affidavits setting forth the
 Judge to de- “ facts of the case, it appear doubtful whether the will
 cide. “ or codicil has been duly executed, the Registrar may re-
 “ quire the parties to bring the matter before the Judge on
 “ motion.
 Death of wit- “ If both the subscribing witnesses are dead, or if from
 nesses or lack “ other circumstances no affidavit can be obtained from either
 of evidence, “ of them, resort must be had to other persons (if any) who
 how supplied. “ may have been present at the execution of the will or
 “ codicil ; but if no affidavit of any such other person can be
 “ obtained, evidence on affidavit must be procured of that
 “ fact, and of the handwriting of the deceased, and the sub-
 “ scribing witnesses, and also of any circumstances which
 “ may raise a presumption in favour of the due execution (b).

Interlineations and Alterations.

- Interlineations “ Interlineations and alterations are invalid unless they
 and alterations “ existed in the will at the time of its execution, or if made
 when valid. “ afterwards, unless they have been executed and attested in
 “ the mode required by the Statute, or unless they have been
 “ rendered valid by the re-execution of the will, or by the
 “ subsequent execution of a codicil thereto.
 On what evi- “ Where interlineations or alterations appear in the will
 dence. “ (unless duly executed or recited in, or otherwise identified
 “ by the attestation clause), an affidavit or affidavits in proof
 “ of their having existed in the will before its execution,
 “ must be filed, except when the alterations are merely ver-
 “ bal, or where they are of but small importance, and are
 “ evidenced by the initials of the attesting witnesses (c).

Erasures and Obliterations.

- When opera- “ Erasures and obliterations are not to prevail, unless
 tive. “ proved to have existed in the will at the time of its exe-

(a) See *Latham deceased*, 10 Jur. N. S. 620.

(b) See *Burgoyne v. Showler*, 1 Robert. p. 5; *Jane Thomas*, 23 L. J. N. S. 33.

(c) See sec. 23 *Wills Act Ont.*

“ cution, or unless the alterations thereby effected in the will
 “ are duly executed and attested, or unless they have been ren-
 “ dered valid by the re-execution of the will, or by the subse-
 “ quent execution of a codicil thereto. If no satisfactory evi-
 “ dence can be adduced as to the time when such erasures
 “ and obliterations were made, and the words erased or ob-
 “ literated be not entirely effaced, but can, upon inspection
 “ of the paper, be ascertained, they must form part of the
 “ probate.

“ In every case of words having been erased or obliterated, Affidavit
 “ which might have been of importance, an affidavit will be thereon.
 “ required.

Deeds &c., referred to in a Will or Codicil.

“ If a will contain a reference to any deed, paper, memo- Documents re-
 “ randum, or other document of such a nature as to raise a ferred to by
 “ question whether it ought or ought not to form a constituent will must be
 “ part of the will, the production of such deed, paper, memo- produced.
 “ randum, or other document, must be required, with a view
 “ to ascertain whether it be entitled to probate, and if not
 “ produced, its non-production must be accounted for.

“ No deed, paper, memorandum, or other document can When a docu-
 “ form part of a will unless it was in existence at the time ment cannot
 “ when the will was executed. form part of a
 will.

Appearance of the Paper.

“ If there are any vestiges of sealing-wax, or wafers, or Indication of
 “ other marks upon the testamentary papers leading to the document hav-
 “ inference that any paper, memorandum, or other docu- ing been an-
 “ ment has been annexed or attached to the same, they must nexed.
 “ be satisfactorily accounted for, or the production of such
 “ paper, memorandum, or other document must be required,
 “ and if not produced its non-production must be accounted
 “ for.

Married Woman's Will by Virtue of a Power..

“ In granting probate of a married woman's will made by The power to
 “ virtue of a power, or administration with such will annexed, be specified in
 “ the power under which the will purports to have been made the grant.
 “ must be specified in the grant.

Codicils.

“ The above rules and orders respecting wills apply equally So, as to
 “ to codicils. Codicils.

Wills made before 1 Jan., 1874. "AS TO PROBATE OF WILLS, CODICILS AND TESTAMENTS, TARY PAPERS RELATING TO PERSONALTY, AND DATED BEFORE THE 1ST JANUARY," 1874 (a).

Execution of a Will.

Execution and Attestation. "It is not necessary that a will, codicil, or testamentary paper, dated before *1st January*," 1874, "should be signed by the testator, or attested by witnesses, to constitute it a valid disposition of a testator's personal property. Although neither signed by the testator, nor attested by witnesses, it may nevertheless be valid, but in such cases the testator's intention that it should operate as his will, codicil, or testamentary disposition, must be clearly proved by circumstances.

When *prima facie* entitled to Probate. "A will, codicil, or testamentary paper signed at the end of it by the testator, and attested by two disinterested witnesses, although there be no clause of attestation, is *prima facie* entitled to probate.

Evidence required. "In cases where a will, codicil, or testamentary paper is attested by two witnesses, such witnesses are not required to have been present with the testator at the same time. It is sufficient if the testator subscribed his name, or made his mark, to the paper in the presence of one attesting witness, or produced it with his name already subscribed, or his mark already made to one attesting witness, and afterwards produced it to the other attesting witness, provided that on each occasion he declared it to be his will, codicil, or testamentary disposition, or otherwise notified his intention that it should operate as such.

If unattested. "If the will, codicil, or testamentary paper is signed at the end of it by the testator, but is unattested, and there is nothing to show an intention that it should be attested by witnesses, the affidavit of two disinterested persons to prove the signature to be of the hand-writing of the testator will be sufficient to entitle the paper to probate.

Proof of hand-writing. "If the will, codicil or testamentary paper is signed at the end of it by the testator, and attested by one witness only, and there is nothing to show the testator's intention that it should be attested by a second witness, the affidavit of one

(a) These instructions "are, in fact, an epitome of the law as it stood previously" to 1st January, 1838, in England. Browne on Probate; London, 1873.

" disinterested person to prove the signature to be of the
 " hand-writing of the testator will be sufficient to entitle the
 " paper to probate.

" The circumstance of a person being named as an execu- Interested wit-
 " tor in the will, codicil, or testamentary paper, or being in- ness.
 " terested as a legatee, or as the husband or wife of a legatee
 " under such will, codicil, or testamentary paper, rendered
 " him or her incompetent to become an attesting witness
 " to it ; so that if the name of a person so interested appears
 " as that of a subscribing witness to the will, codicil, or tes-
 " tamentary paper, the same, so far as regards his or her at-
 " testation, must be considered as unattested, and his or her
 " evidence in support thereof will be inadmissible, unless he
 " or she shall first release his or her interest thereunder. (a)

" If an attestation clause, or the word ' witness ' appear If will *prima*
 " written at the foot of the paper, the same being unattested, *facie* incom-
 " or if the paper purport on the face of it to be a draft of a plete.
 " will, the copy of a will, or instructions for a will, it must
 " *prima facie* be considered as an incomplete paper, and not,
 " save under special circumstances, entitled to probate.

Appearance of Paper.

" Any appearance of an attempted cancellation of a paper Presumption
 " by burning, tearing, obliteration, or otherwise, and every of revocation.
 " circumstance leading to a presumption of abandonment or
 " revocation of a paper on the part of the testator must be
 " accounted for.

Alterations and Interlineations.

" Alterations and interlineations made by the testator, if Alterations,
 " unattested, are to be proved by the affidavits of two per- &c., how
 " sons as to his hand-writing. If the same are in the hand- proved.
 " writing of any person other than the testator, it will suf-
 " fice to prove by affidavit that such alterations and inter-
 " lineations were known to, and approved of, by the testa-
 " tor. Proof by affidavit that they existed in the paper at
 " the time it was found in the repositories of the testator,
 " recently after his death may, under circumstances, suffice.
 " Alterations and interlineations made since the 31st of De-
 " cember, 1873, " are subject to the provisions of " 36 Vic,
 " c. 20.

(a) See secs. 17, 18, 19, Wills Act Ont. ; and *Crawford v. Boyd*, 22 Gr. 398.

Deeds, etc., referred to in a Will, or annexed to a Will.

Incorporated papers. "With respect to deeds, papers, memoranda, or other documents mentioned in a testamentary paper, or appearing to have been annexed or attached thereto, the foregoing *** instructions as to wills bearing date since the 31st December 1873, "apply."

Republication by Codicil.

Revival of Wills made before Wills Act. "A will made before the 1st of January, 1874, is republished, by a subsequent codicil thereto duly executed (a).

Mode of Execution.

Mode of execution. "In every case where an affidavit is made by a subscribing witness to a will or codicil, such subscribing witness is required to depose as to the mode in which the said will or codicil was executed and attested."

Codicil. Since the Wills Act the word "codicil" can only mean a testamentary paper duly executed and attested (b).

Defective execution supplied. The defective execution of a testamentary paper may be supplied by a subsequent document duly executed, but the earlier instrument must be so described that there can be no doubt as to its identity (c).

Execution of wills since Wills Act. The manner in which a will is to be executed is prescribed by the Statute (sec. 12).

By *execution*, is to be understood the whole operation which is necessary to make a document testamentary in the first instance (*Casement v. Fulton*, 5 Moo. P. C. C. 141).

Position of testator's signature. By sec. 12, s-s. 2, "Wills' Act," the signature of the testator may be placed:—

1. "At" the end of the will,—or

(a) See Wills Act, Ont., sec. 24.

(b) *Vide* Interpretation clause "Wills Act;" *Croker v. The Marquis of Hertford*, 4 Moo. P. C. C. 339, 362; and *In Re Trusts of Anne Parker's Will*, 20 Gr. 389.

(c) *Habergham v. Vincent*, 2 Ves. Jr. 231.

2. "After" the end of the will,—or
3. "Following" the end of the will,—or
4. "Under" the end of the will,—or
5. "Beside" the end of the will,—or
6. "Opposite to—the end of the will,"—so that "it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will."

"And no such will shall be affected by the circumstance that the signature:—

1. "Does not follow, or is not immediately after the foot or end of the will,—or

2. "By the circumstance that a blank space intervenes between the concluding word of the will and the signature,—or

3. "By the circumstance that the signature is placed among the words of the *testimonium* clause,—or

4. "Of the clause of attestation (a),—or

5. "Follows or is after, or under the clause of attestation, either with or without a blank space intervening,—or

6. "Follows or is after or under, or beside the names, or one of the names of the subscribing witnesses,—or

7. "By the circumstance that the signature is on a side or page, or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will is written above the signature,—or

8. "By the circumstance that there appears to be sufficient space on, or at the bottom of the preceding side or page, or other portion of the same paper on which the will is written to contain the signature; * * * *

(a) *Powers*, 1 P.D. 70.

Where
signature
ineffectual.

9. "But no signature under this Act shall be operative to give effect to any disposition or direction, which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature was made."

Mark.

A mark made by the testator, his hand being guided, and he being unable from bodily weakness to sign, has been held sufficient (a).

And a will was declared valid which was signed by a mark, although the testator's name did not appear in it (*Bryce*, 2 Curt. 826 [1839]).

Stamp.

A signature impressed with a marking stamp by the testator's direction was held sufficient (b).

Sealing.

Sealing is not good as a signature (*Ellis v. Smith*, 1 Ves. Jr. 13; *Wright v. Wakeford*, 17 Ves. Jr. 454).

The will of a testatrix, signed by her former name, was admitted to probate as duly executed (*Glover*, 5 No. Ca. 553).

Genuine execution upheld.

Within the limits of reasonable construction, the Court is prepared to go all lengths to save a genuine act of execution from entanglement and defeat by formal requirements (c); but where the execution fails to comply with the requirements of the Wills' Act, probate will be refused.

Defective execution, instances.

The following are instances of defective execution which have been the subject of legal decision:—

Position of testator's signature.

Probate was refused of a paper as not being signed at the *foot or end*, the signature and attestation clause being in the middle of the back of the page on which the will was written, erasures and alterations unattested and unexplained appearing on both pages (d).

(a) *Wilson v. Bedard*, 12 Sim. 28.

(b) *Jenkins v. Gaisford*, 3 Sw. & Tr. 96.

(c) *Jones* 34 L. J. P. M. & A. 41; 4 Sw. & Tr. 3 per Sir J. P. Wilde—
1865.

(d) *Ayres v. Ayres*, 5 No. Ca. 375 (1847); see also *Willis v. Love*—
ib. 433 (1847).

Probate was refused to a will written on a printed form to which the deceased added opposite the clause of attestation certain legacies, and then, in the presence of witnesses wrote his name in the attestation clause (a). Signature in the attestation clause.

Probate was sought of a document consisting of six pages, five of which were duly signed and attested, but the sixth page continuing and formally concluding the will was left unsigned only from an oversight. There being evidence of an intention to execute this page also, the Court declined to reject it as immaterial, and refused probate of the entire document as not signed at the foot or end (b). Foot or end.

Probate was refused of a testamentary paper which contained a specific bequest, and an appointment of executors below the signature of the testatrix and between those of the attesting witnesses, as follows :

" William Thomas Scott and Frederick James Harold each to have a suit of black.

" MARTHA TOPHAM,

" ELIZABETH ROGERS.

" To Mary my gold chain. I appoint Frederick James Harold and William Thomas Scott, executors. Anna Maria Scott, executrix.

(Witness) *" ANNA MARIA SCOTT."*

The Court considered the paragraph between the signatures of the witnesses " a continuation of, and not an addition to the will." Sir H. J. Fust remarking that " Miss Scott merely attested the clause beneath the signatures of the testatrix, and Mrs. Rogers, and that clause clearly has not been executed or attested by the testatrix and Mrs. Rogers. In other words the entire will has neither been attested

(a) *Birkett*, 6 No. Ca. 597 (1848).

(b) *Sweetland v. Sweetland*, 4 Sw. & Tr. 6 ; and 34 L. J. N. S. P. M. & A. 42 (1865).

by Miss Scott, nor signed at the foot or end by the testatrix " (a).

Acknowledgment.

The acknowledgment by the testator of his own signature or the signature made by some other person in his presence and by his direction is sufficient, if attested, as required by the Act (b).

Attestation.

The signature is now to be made or *acknowledged* by the testator *in the presence of two or more witnesses present at the same time* (c).

Where a testator, not having nominated executors, had signed his will as follows :

" In testimony of, &c., I have this day signed my name,
" GEORGE COTTON.

" being the twenty-first day of January, in the year of our
" Lord one thousand eight hundred and forty-five, in the pres-
" ence of my executors, or trust for the just fulfilment of my
" last wishes and desires herein described,

"(Witness) WILLIAM AUSTIN.

" ELIZABETH AUSTIN."

—the court decreed probate of the paper as it stood, not to them but to a legatee, refusing to reject the words after the signature, as they formed part of the attestation clause, but treating them, though possibly "a constructive appointment of executors and trustees," as descriptive only and not dispositive (d).

And probate of will apparently duly signed and attested, but having a clause nominating executors appearing below the signatures, though actually written before them, was refused. Afterwards a grant of administration with will annexed, without

(a) *Topham v. Topham*, 2 Rob. 189 ; & 7 No. Ca. 272 (1850).

(b) *Regan*, 1 Curt. 908 (1838). See also *Warden*, 2 Curt. 334 (1839), *Thompson*, 4 N. C. 643 (1846), and *Clark*, 2 Curt. 329,—in which case the person directed signed his own name and not that of the testator.

(c) *Morrill v. Douglas*, L. R. 3 P. & D. 1 (1872).

(d) *Cotton*, 6 No. Ca. 307 ; 1 Robert. 658.

that clause, was by consent made to the residuary legatee (a).

If there be no date, or if there be an imperfect date only, to a will, one of the attesting witnesses must supply it by making an affidavit in proof of it. If neither of the attesting witnesses nor any other person can make this affidavit, evidence must be given showing that the will is the latest or the only will of the testator. If a codicil be undated, or imperfect in date, the same affirmative evidence must be procured from one of the attesting witnesses; or if both of them are unable to recollect the date, and no one else can supply it, evidence must be given showing at least its deposit amongst the testator's papers of importance (b).

Date of will or codicil supplied.

If both witnesses agree in distinctly negating the execution of a will or codicil, the court, on their affidavit being filed, tacitly allows another will to be proved, or excludes the codicil from probate, or permits mere administration to be taken, as in the case of intestacy (c).

Affidavit negating the execution of a will.

If, out of three or more witnesses to a will or codicil, one shall turn out not to have legally attested the instrument, the court will, notwithstanding, not exclude the subscription of such unnecessary and non-attesting witness from the probate and the registration (d).

Subscription of non-attesting witness not excluded from probate.

But where a residuary legatee, who had been present at the execution of a will, wrote her name, at the request of one of the attesting witnesses, underneath the attestation clause, after the execution of the will, the court being satisfied that she had not

Excluded.

(a) *Thomas Howell*, 2 Curt. 342 (1839); see also *Davis*, 2 N. C. 351 (1843), and *Davis*, 3 Curt. 749.

(b) *Coote*, p. 82.

(c) *ib.*, p. 84, and *ante* p.

(d) *J. Forrest*, 2 Sw. & Tr. 334 (1861).

signed the will as a witness, directed her signature to be omitted from the probate (a).

Obliterations &c. *In the goods of John E. White*, upon evidence that certain unattested erasures and obliterations appearing in the will did not exist at the time of execution, probate was upon the *fiat* of the Surrogate of the Home District (Hon. W. H. Blake, 26 March, 1843), granted of the will as it stood before any of the obliterations or erasures took place.

Evidence affirming alterations in a will. If proof can be adduced that interlineation, interpolations, erasures, words or figures written upon erasures, or anything of the nature of an alteration, or an unauthenticated addition appearing in the will, were written and made at a period preceding the execution of the will, they are entitled to probate. Affirmative evidence of this character can occasionally be produced from an attesting witness who observed the alterations, or whose attention was drawn to them before or at the period of the execution, or from the drawer of the will, who can depose that the parts apparently interpolated or altered, accord with his draft, or from the writer or engrosser of the will who can prove them to have been his own ministerial handiwork either as the correction of his own error in copying, or as a change of intention on the part of the testator previously to the execution of the will (b).

An affidavit from any one of the persons designated or from any other person who is in any other mode qualified to despose affirmatively is sufficient to entitle the alteration to probate.

Any alteration or revocation made in or of the provisions of a will after the 1st January 1874, to

(a) *Sharman*, 38 L. J. R. (N. S.), P. & M. 47; and L. R. 1 P. & D. 661 (1869).

(b) See Wills' Act, sec. 23; Coote, 85 & ante p.

be effectual must be attested in the same manner as a will requires to be attested, and that notwithstanding the will was made anterior to that date (a).

A single interlineation or interpolation will prove itself if the signature, or the initials of the signatures of the testator, and the two attesting witnesses are written opposite to, or near it. Initialing alterations.

A recital of an alteration in the attestation clause is satisfactory evidence as to that alteration (b). Declarations by testator.

Declarations made by a testator previously to the to the execution of his will, which agree with alterations appearing in it, demonstrate that the alterations are not after-thoughts, and are evidence that they were made before the execution of the will (c).

Proof of Wills.

As analagous evidence, Lord Campbell has ranked the following, viz.: the production of the draft of the will, corresponding with the will in its altered form, and written and verbal instructions from the testator to his solicitor, to draw the will in its altered form (d). Alterations.

If alterations made in a will, after its execution, can be shown to have been made before the execution of a codicil thereto, they are by such codicil made valid (e).

The mere circumstance, however, that an alteration has been dated by a testator as before the exe-

(a) *Smith v. Meriam*, 25 Gr. 383 & see sec. 23 Will's Act, & p. ante.

(b) ante p. 180, & Coote, 86.

(c) *Doe and Shallcross v. Palmer and others*, 20 L. J. R. (N. S.), p. 367; *Dench v. Dench*, L. R., 2 P. D. pp. 64, 65; and see *James v. Shrimpton*, 1 P. D. 431. (In *Dench v. Dench* the testator had used a lithographed form of will.)

(d) *Doe and Shallcross v. Palmer and others*, 20 L. J. R. (N. S.) p. 373, and 16 Q. B. p. 747, and *J. P. Ripley*, 1 Sw. and Tr. 69.

(e) *Lushington v. Onslow*, 6 Notes of Cases, 188, and *Bradley*, 5 Notes of Cases, p. 188.

cution of his will, does not entitle such alteration to probate (a).

Verification of alterations as directed by Wills Act.

Alterations, however, which, though made after execution, have been either executed in the manner required by the Statute for the execution of the will itself, or are verified by the signatures or initials of the testator and the witnesses, are admissible to probate; for the 23rd section of the Wills' Act of Ontario allows the validity of an alteration, if it has been executed in the manner required by the same Act for the execution of the will itself; or failing this, if the signature of the testator and the subscription of the witnesses have been made in the margin or on some other part of the will opposite to or near the alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

Presumption of law against alterations.

If however, no affirmative evidence can be obtained, the presumption of law is (where the will has been made since the Wills' Act) that an alteration has been made subsequently to the execution of the will, and it will accordingly be excluded from probate (b).

Words or figures restored.

If the obliterations and erasures are so incomplete that the original words or figures can be read or deciphered either by the naked or assisted eye, the court will restore them in all cases, and will grant probate of them, and will allow the use of magnifying glasses, but not chemical agents to remove the obscuring ink (c).

If, however, the original words cannot be read,

(a) *Adamson*, 3 L. R., P. & D., p. 253.

(b) *Cooper v. Bockett*, P. C. 4 No. Ca., p. 685; see also *Ibid*, p. 659, & *Smith v. Meriam*, *supra*.

(c) *Horsford*, W. R. vol. 23. p. 211; 3 L. R., P. & D. pp. 214-216, 1874.

either by the naked eye or through extrinsic aid, the court exercises two different principles in its way of dealing with them. Words, &c., not apparent.

If a testator has obliterated or erased the whole of a bequest or provision in his will, or has completely covered it by paper pasted over it, and has so effectually accomplished his purpose, that the passage is not apparent, *i. e.*, cannot be made out on the face of the will, the revocation is complete, under the twenty-third section of the Wills' Act, and the Court grants probate of a blank (*a*).

But where part of a legacy only, viz: its amount or the names of the legatee, has been so covered, or obliterated or erased, leaving the name of the legatee or the amount of the legacy untouched, the Court infers that the testator's intention was only to revoke the original name or amount in the event of his having effectually substituted another, in which case the doctrine of dependent relative revocation becomes applicable; and, by this doctrine, the obliteration or erasure being done with reference to another act, meant to be an effectual disposition, will be a revocation or not, according to the efficiency of the relative act. But the alteration in the name or amount, *i. e.*, the relative act, not being executed according to the Statute, there is no revocation at all, and the Court will restore and grant probate of the original words, for which others were sought to be substituted. In these cases the Court has exercised the right of ascertaining *aliunde*, by parol evidence, what the original words or figures were, in order to restore them (*b*).

Amount of legacy restored.

Erasures, &c., when revocations.

Dependent relative revocation.

Court will ascertain original words.

Where the testator had erased in his will, with a

(*a*) *Horsford* 3, *ante*; *Townley v. Watson*, 3 Curt. p. 766; *Harris*, 1 Sw. & Tr. 538.

(*b*) *Horsford*, *ante*.

*22nd section
Wills' Act of
Ontario.

As to how only
will can be re-
voked.

knife, the amount of an annual jointure of £200, and had substituted for it, in his own handwriting, a sum of £100. He had also written under the clause of attestation an explanatory memorandum of what he had done, but the memorandum was not attested as required by the Wills' Act. It was held: 1st, that the 20th* section of the Will's Act required that there should be on the part of the testator an intention of revoking; 2nd, that the evidence adduced showed that the testator did not intend to revoke absolutely, but meant to revoke by substituting a different sum for that originally bequeathed; 3rd, that the alteration could not take effect, because it was not executed according to the Statute; and, finally, that therefore, the revocation was ineffectual, and the will must stand in its original state (a).

In a case where a strip of paper was pasted over the amount of the legacy, leaving the name of the legatee untouched, the Court, inferring that the testator's intention was only to revoke the part covered, in the event of his having effectually substituted another bequest in its place, exercised its right of ascertaining the original disposition by any means of legal proof, removed the strip of paper, and having thus ascertained the original word, granted probate of the codicil as unaltered (b).

Restoring
words, &c.,
erased, &c.

Where the name of a legatee was so entirely erased that it was no longer apparent, another being substituted for it, on evidence being given as to what the original name was, the Court restored it (c).

But the restoration of the original words which

(a) *Brooke v. Kent*, 3 Moo., P. C. 34; 1 No. of Ca. 95, 1841. The provisions of the Wills Act as to revocation do not apply to wills of persons who died before 1st of January, 1869: see section 8.

(b) *Horsford*, *supra*: see also *Lushington v. Onslow*, 6 No. of Ca. 183; *Soar v. Dolman*, 3 Curt. 121; Parr. 1 L. J. R. (N. S.), vol. 29, p. 70.

(c) *McCabe*, L. R., 3 P. & D. p. 96.

constituted the name of the legatee, or the amount of the legacy, is, of course, conditioned upon the possibility of obtaining evidence of what, in either case, these were. Where this evidence cannot be obtained, the Court is under the necessity of granting probate of 'a blank (a).

Unattested alterations in the testator's handwriting, in a will executed before the Wills' Act came into operation, will, in the absence of a date, be presumed to have been made before that Act came into operation, and are entitled to probate without any affirmative evidence (b).

In wills made before Wills' Act, presumption in favor of alteration.

The same principle is also applied to alterations in a will made by a soldier in actual military service, the alterations being in his own handwriting (c).

All verified alterations, however, are not necessarily admitted to probate; they are subject to the discretion of the Court. It will see with what object the alterations have been made.

Verified alterations, where not admitted to probate.

If it can determine that they represent a definite intention of the testator, it will adopt them; but if it is of opinion that they were deliberative only, they will be omitted from probate, as not being included even in any confirmation made subsequently by the testator (d).

Alterations which have been made since a testator's decease, or by unauthorized persons at any other time since the execution of a will, being of the nature of felony, are, by the practice in England,

Alterations not made by testator, or by his directions.

(a) *E. S. James*, 1 Sw. & Tr. 239, and *Sir C. Ibbetson*, 2 Curt. 337.

(b) *Streaker*, 4 Sw. & Tr. 194, and 28 L. J. R. (N. S.) P. & M. 50; *Pennington*, 1 Notes of Cases 399; *Pechell v. Jenkinson*, 2 Curt. 273.

(c) *Tweedale*, 3 L. R., P. and D. p. 206.

(d) *Hall*, L. R. 2 P. & D. p. 358.

submitted to the Court for its directions as to the course to be pursued (Coote, 7th ed. 92).

Suspicious or suggestive appearances on the face of a will or codicil. Evidence to rebut.

Where vestiges of sealing-wax, or wafers, or other marks appear on testamentary papers, as referred to at p. 181 *ante*, the presumption of spoliation must be rebutted. This may be done by evidence, showing either that the testator, *per se* or *per alium*, removed a codicil or a portion of the will, or that when the will was found, on the occasion of the testator's death, it was in the identical condition in which the executor produces it to the Court.

Exclusion of word from probate.

The Court will exclude from probate any part of a will which the testator did not know to be therein.

So when a revocatory clause has been introduced into a will, without the instructions or knowledge of a testator the Court granted probate without that clause (*a*).

And a similar order was made in another case where a testator had been found by the verdict of a jury not to have known or approved of a residuary clause in his will (*b*).

The Court has also constantly excluded from probate words of atrocious, offensive or libellous character (*c*); but it cannot exclude any words or sentences which do not come fully within such category (*d*).

Date of will shown by affidavit.

If the date be inaccurately given in the original will the Court will allow the true date to be shown by affidavit.

The true date will be inserted in the probate (*e*), but not in the annexed engrossment of the will.

(a) *Oswald L. R.*, 3 P. & D. p. 162; and see *Harter v. Harter*, ib. p. 11.

(b) *Fulton v. Andrew*, 7 L. R. E. & I. Appeals 448.

(c) *George Wartnaby*, 4 Notes of Cases 477; *Marsh v. Marsh*, 1 Sw. & Tr. 536.

(d) *Curtis v. Curtis*, 3 Add. 33. See *Honeywood*, L. R. 2 P. & D. 251 & 252.

(e) *Aluchin*, L. R. 1 P. & D. 665.

When a will was referred to in a codicil under a date which belonged to an earlier will, the Court corrected the reference, and granted probate of the will intended to be referred to (a).

In Sugden v. Lord St. Leonards (b), a will, to ^{Lost wills.} which there were codicils could not be found after the death of the testator, but his daughter, recollecting the will, wrote it out from memory. She had lived with the testator all her life; and he had constantly consulted her about the will, and explained its provisions to her, and she had from time to time assisted him to make and alter it. Some parts she could not remember, but much of what she recollected was corroborated by the codicils, and by declarations of testator to others after execution. She took by the will a considerable share of the property, and of the residuary estate. Of this there was no direct corroboration; but her veracity was admitted by those who opposed probate. Ultimately the Court of Appeal, affirming the decision of the President of the Probate Division, held the presumption of destruction *animo revocandi* rebutted, and being satisfied that the contents of the will were substantially as stated by the daughter, held also, affirming the decision of the lower Court, that the will, as written down by the daughter, should be admitted to probate. And also that declarations by a testator, whether before or after the execution of the will, were admissible as evidence of its contents, overruling *Quick v. Quick* (c).

The substance of a lost will as contained in recitals in a deed was admitted to probate in the Surrogate Court, County of York (d).

(a) *Anderson*, 39 L. J. R. (N.S.) P. & M. 55.

(b) L. R. 1 P. D. 154 (1876). 4 L. J. N. S. (P. M. & A.) 49.

(c) 3 Sw. & Tr. 442 (1864.)

(d) *In goods of the Hon. H. J. Boulton, deceased*, 2 Nov., 1877.

Deaf and
dumb testator.

Where a deaf and dumb testator has made his will by communicating his instructions by signs and motions, the Court before pronouncing for the will required an affidavit by the drawer of the nature of the signs and motions with which he communicated with the deceased; and when this was furnished on a succeeding application it was deemed unsatisfactory, and the motion was rejected for the consent of the next of kin to be obtained (a).

In cases of this description the affidavits must be prepared with the utmost possible precision and accuracy (a).

SECTION V.

INCORPORATION OF PAPERS OF REFERENCE, ETC.

Where a testator, by his will or codicil, expressly refers to any other documents which are in existence at the time, such as deeds, wills, or codicils, of himself or of other persons, or even to papers void or invalid *per se*, as carrying out or containing his own dispositions, such documents and papers are considered to be incorporated in and to form part of the will, being considered equally valid with the will, and are included by the Court in the probate (b).

Amongst instruments which have been so incorporated are the following:—

A deed of settlement (c).

The will of another person (d).

(a) *Owston*, 2 Sw. & Tr. 461 (1862). See also *Axford* 1 Sw. & Tr. 540 (1860).

(b) *Stockwell v. Ritherdon*, 1 Rob. 661; *Wilkinson v. Adam*, 1 Ves. & B. 446, *Habergham v. Vincent*, *supra*; *Sheldon v. Sheldon*, 3 No. of Ca. 250, and 1 Rob. 81. (1844).

(c) *Thomas Dickens*, 1 No. of Ca. 396; & 3 Curt. 60; *Wm. Frederick Peatner*, 4 No. of Ca. 479.

(d) *Emma Darby*, 4 No. of Ca. 428.

The revoked will of another person (a).

The testators former will (b).

Papers invalid *per se*, unexecuted, or unattested papers (c).

Catalogues or schedules (d).

But a paper which would not affect the operation of the will in law or in equity need not be embodied in the probate (e).

In *Allen v. Maddock* (f), Lord Kingsdown, in delivering the judgment of the Court, said, "The result of the authorities both before and since the late Act (the Wills Act) appears to be, that when there is a reference in a duly executed testamentary instrument to another testamentary instrument, by such terms as to make it capable of indentification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves, that in the existing circumstances there is no doubt as to the instrument, it is no objection to it that by possibility circumstances might have existed in which the instrument referred to could not have been identified. As in this case, the only question is, whether there is sufficient evidence to identify the paper propounded as the will; it is not necessary to consider, whether any evidence was received in this case to which objection might be made. The facts on which we rely are beyond all question ad-

Parol evidence in identification of the paper referred to.

Evidence to identify.

(a) *Countess of Durham*, 1 No. of Ca. p. 368.

(b) *James Gordon Duff*, 4 No. of Ca. 474. (c) *Francis Willesford*, 3 Curt. 77; *Thomas Smartt*, 4 No. of Ca. p. 38; *Countess Ferraris v. Lord Hertford*, 3 Curt. p. 468; *Wood v. Goodlake*, 1 No. of Ca. 155; *Emma Hakewell*, 1 Deane, 14; *A. M. Ash*, Ibid. 181; *J. F. Smith*, 2 Curt. p. 796. *Ingoldby v. Ingoldby*, 4 No. of Ca. 404; *Maddock v. Allen*, 1 Deane, 325; *W. Claringbull*, 3 No. of Ca. 1; *E. Hill*, 4 No. of Ca. 404.

(d) *R. M. Bacon*, 3 No. of Ca. 645; *The Baroness Truro*, 35 L. J. P. & M. 89. (1866).

(e) *Ouchterlony*, 32 L. J. P. & M., 140.

(f) 11 Moo. P. C. C. 427 (1858).

missible in evidence, viz., that the paper in question was written by the testatrix, was found locked up in her possession at her death, in a sealed envelope, on which there was an endorsement describing it as her will, and that after diligent search, no other paper has been found answering the description, and that the only trace of any other testamentary paper in the evidence is the proof of an earlier will which the testatrix destroyed."

"It may be said on the present occasion, the Court of Probate is to a certain extent a court of construction, for it has to determine what is the meaning of the reference made by the testatrix in her codicil, and whether any, and if any what, instrument found at her death is thereby referred to. This question is one of fact, which obviously must be explained, and can only be explained by parol evidence. At first sight there is no difficulty, there is no ambiguity whatever in the expressions by which the reference is made. Parol evidence must necessarily be received to prove, whether there is or is not in existence at the testatrix's death any such instrument as is referred to by the codicil. For this purpose inquiry must be made, and evidence must be offered, to show *what papers there were, at the date of the codicil, which could answer the description contained in the codicil*; and the court having by these means placed itself in the situation of the testatrix, and acquired as far as possible all the knowledge which the testatrix possessed, must say, upon a consideration of these extrinsic circumstances, whether the paper is identified or not."

The reference.

How explained.

Parol evidence

The following general principles appear to be deducible from the cases referred to, viz.:

1. That the testamentary instrument should clearly

describe the document proposed to be incorporated ; but the document may be identified by parol (a).

2. The testamentary instrument must describe it as already existing ; if defective in this, the fact cannot be supplied by parol (b).

Part only of a paper may be embodied in the probate, *Nathan v. Morse* (c).

In *Billinghurst v. Vickers* (d), part of a will was established, and part held not entitled to probate.

In the case of deeds as well as of documents not valid *per se*, the Court requires the original to be produced. In the case of a deed, it will permit it to be delivered out to the trustees after probate, it being first duly registered. In *Dickens' case* and *Sheldon v. Sheldon*, ante, a notarial copy was directed to be left in the registry, and probate was granted of the will and of a notarial copy of the deed. Originals produced, &c.

But the Court will also permit a copy of a deed to be brought in and proved (e). And occasionally, when the deed is in the hands of a person who will not part with it, the Court having no power to enforce its production, will decree probate without it (f). But if the paper in question be invalid and inoperative *per se*, and made probative by reference only, the Court will enforce its production, for such a paper, unlike a deed, must be proved, *ex necessitate*, in order to give it operation and legal existence (g). Copy of deed proved.

In the goods of *William B. Astor, deceased* (h), the testator, a citizen of the United States, domiciled therein, by will and codicil disposed of his property generally ; and by a second will in which he named Case in which incorporation in probate unnecessary.

(a) *Edwards*, 6 No. of Ca. 306 ; *Utterton v. Robins*, 1 A. & E. 403.

(b) *Ante*, p. 181. (c) 3 Phill. 529. (d) 1 Phill. 1821.

(e) *Thomas Dickens*, 1 No. of Ca. p. 399.

(f) *Thos. Battersby*, 2 Robertson, p. 440.

(g) *Sheldon v. Sheldon*, *supra*.

(h) 1 P. D. 150, and 45 L. J. (P. M. & A.) 79.



separate executors of moneys invested in the British funds, he expressed a wish that the British will should take effect as a separate testamentary disposition of property, independent of and disconnected from his general will; it was held that it was unnecessary to incorporate the American will, which was very bulky, in the English probate; but that an authenticated copy of the American will and codicils should be filed in the registry, and a note be added to the English probate to the effect that such a copy had been so filed (a).

Copy filed.

CHAP. IV.—SECTION I.

ADMINISTRATION.

Administra-
tion.

Under the S. C. Act, sec. 2, s. s. 2 *ante*, the word "administration," when occurring in the Act, is to be understood as comprehending "all letters of administration of the effects of deceased persons, whether with or without the will annexed, and whether granted for general, special, or limited purposes."

Intestacy.

If a man die intestate, or, if leaving a will, he appoint no executor, or if all his executors refuse to act or die without proving the will, letters of administration of his personal estate and effects will, upon application, be granted by the proper Court (in Ontario, a Surrogate Court) to the party entitled.

Such letters constitute the sole authority for the administration of the personal estate of a person so dying (b).

(a) See also *Marquis of Lansdowne*, 32 L. J. P. & M. 121; *Dundas*, 32 L. J. P. & M. 165; *Sibthorpe*, L. R. 1 P. & D. 106.

(b) D. & B. 393.

When granted, they relate to the day of the intestate's death, if such relation be for the benefit of the estate (a).

The administrator receives his right entirely from the grant of administration; the right of the executor is derived from the will, and not from the probate (b).

The Statute of Westminster the Second (13 Edw. I. c. 19, A.D. 1286), contains the first statutory recognition of the jurisdiction of the ordinary in the goods of persons dying intestate, and by 31 Edw. III. Stat. 1, chap. 1, it became imperative that the ordinary who had hitherto appointed whom he pleased to be his deputies, should depute the next and most lawful friends of the deceased to administer the goods; and by 21 Henry VIII. cap. 5, s. 3, he must have granted the administration to the widow of the deceased, or to his next of kin, or to any of them, or to both, at his discretion. To widow or
next of kin.

Since these Acts, subject to the right of selection reserved by the statute just mentioned to the ordinary, and now exercised by Surrogate Courts, the title to a general administration is *de jure* (c). Title *de jure*.

Even where the estate was insolvent, the ordinary was bound by the Statute to make the grant to the next of kin (d).

Upon the construction of the Statutes it has been held that the husband, as the nearest and most lawful friend, is exclusively entitled to the administration of his wife's effects (*Rex v. Bettesworth, supra*; *Elliott v. Gurr, supra*) that where there is a widow and next of kin, or several next of kin of equal degree, The husband.

Widow and
next of kin.

(a) *Morgan v. Thomas*, 8 Exch. 302; *Beard v. Ketchum*, 5 U. C. Q. R. 120.

(b) *ante* p. 144, and *Comber's Case*, 1 P. Wms. 767.

(c) *Rex v. Bettesworth*, 2 Str. 892; *Elliott v. Gurr*, 2 Phill. 16, see 2; *Cox*, II. c. 3, s. 25. (d) *Dimes v. Cornwell*, 2 Rob. 142.

Discretion of Court not interfered with.

the grant may be made to either or to both (a), and that the secular Courts will not interfere with the exercise of the discretion of the Court of Probate (*Anon.* 1 Str. 552).

Administration divided.

The Court may grant the administration of part of the estate to one claimant, and of other part to another (b).

Those who were next of kin at the time of the death, are the parties entitled to the grant, and not those who may be next of kin, when it is applied for.

A dead man can have no next of kin; the rule being that where a representation has been taken out, and another is applied for, the course is to make the grant to the interest, and not to the persons who have since become, but who were not, next of kin at the death (c).

De bonis grants, however, are made to those who are nearest of kin at the time of the application (d).

Primary object, interest of estate.

In exercising the discretion entrusted to it the court is not guided by the wishes of the parties (e), or by those of the deceased (f). The primary object is the interests of the estate. Its first duty is to place the administration in the hands of that person who is likely best to convert it to the advantage of those who have claims, either in paying the creditors or making distribution (*Warwick v. Greville*, *supra*).

Joint administrations.

The Court discourages a joint administration (g) because a sole administration is infinitely better for the estate. Administrators, however numerous,

(a) *Sir George Sand's case*, 3 Salk. 22, and see 1 P. Wms. 44; 1 Sid. 179. (b) *Fawcay v. Fawcay*, 1 Salk. 36. (c) *Savage v. Blythe*, 2 Hagg. App. 154. (d) *Skeffington v. White*, 1 Hagg. 699. (e) *Warwick v. Greville*, 1 Phill. 125. (f) *Williams v. Wilkins*, 2 Phill. 100. (g) *Naylor*, 2 Rob. 409, *sed vide Hancock v. Lightfoot*, 33 L. R. P. and M. 174.

must join and be joined in every act (*a*). They cannot, like executors, act independently of each other (*b*). It is contrary to the ordinary practice to join more than three in administration, but under special circumstances more than three have been joined in grant (*c*).

And the Court never forces a joint administration, because if the persons be at variance, it will almost put an end to the administration (*d*).

In general, the widow is preferred to the next of kin; there are many instances, however, in which the Court has set aside the widow (*e*).

Primogeniture gives no right, but if the scale be exactly poised, being the elder brother or sister will incline the balance (*f*). Primogeniture.

The whole blood is preferred to the half-blood, even though the majority of the interests should concur in supporting the latter (*g*). The whole blood.

Dignity of blood is not material, a grandfather on the father's side and a grandmother on the mother's side are equal in degree (*h*). Dignity of blood.

Except in the case of the widow, males are preferred to females (*i*). Males.

Ceteris paribus, a man of business is entitled to the preference among males (*j*). Man of business.

The general principle, both by the Statute and by practice, is to give the management of the property to the person who has the greatest interest in it (*k*). Persons having greatest interest.

(*a*) *Warwick v. Greville*, *supra*, *Harrison v. All persons, &c.*, 2 Phill. 349. (*b*) *Stanley v. Bernes*, 1 Hagg. 221. (*c*) *Blakelock*, 1 Hagg. 682. (*d*) *Warwick v. Greville*, *supra*; *Dampier v. Colson*, 2 Phill. 54; *Prentice v. Prentice*, 3 Phill. 311. (*e*) *Atkinson v. Lady Anne Barnard*, 2 Phill. 316; *Webb v. Needham*, 1 Add. 494. (*f*) *Warwick v. Greville*, *supra*; *Coppin v. Dillon*, 4 Hagg. 361. (*g*) *Mercer v. Morland*, 2 Lee. 499; *Stratton v. Linton*, 31 L. J. P. and M. 48. (*h*) *Moore v. Berham*, 1 P. Wms. 53. (*i*) *Chittenden v. Knight*, 2 Lee. 569; *Iredale v. Ford*, 1 Sw. and Tr. 306; *Leggatt v. Leggatt*, 1 Lee. 349. (*j*) *Williams v. Wilkins*, *supra*. (*k*) *Elwes v. Elwes*, 2 Lee. 575; *Tucker v. Westgarth*, 2 Add. 352.

But the Court is not obliged to give it to the greatest interest (a), and the rule will not hold where the contest is between one of the whole blood and one of the half blood (*Mercer v. Moorland, supra*).

Majority of interests.

Where there is no material objection on the one hand, or reason for preference on the other, the Court in its discretion puts the administration in the hands of the person with whom the majority of interests are desirous of entrusting the estate (b).

Wishes of creditors.

This rule prevails over that which gives a preference to males over females when the two conflict (c).

The wishes of creditors are not of weight in all cases, but they are entitled to consideration where the property is considerable, the demands heavy, and the solvency of the estate in the slightest degree questionable (d).

Resident preferred.

A person resident in Ontario will be preferred to the attorney of a party out of the jurisdiction (e).

Party having prior right to be cited.

Wherever a party has a prior right to administration, the Court always requires that he should be cited if he do not renounce or consent, though he may have no interest in the property (f).

When no next of kin.

If there be no next of kin, or if the next of kin be unknown, notice must be given to the Attorney-General (g).

If he neither assent to nor oppose the grant, he must be served with a citation (h).

First applicant.

When administration is applied for by some or one only of the next of kin, there being other per-

(a) *Cardale v. Harrey*, 1 Lee 177, 2 Phill. 242. (b) *Budd v. Silver*, 2 Phill. 115. (c) *Iredale v. Ford*, 7 W. R. 462. (d) *Warwick v. Greville, supra*. (e) *Coke, deceased*, 3 Add. 22. (f) *Barker, deceased*, 1 Curt. 592; S. C. R. 9 and 12 ante. (g) *Colvin v. H. M. Proc. Gen.*, 1 Hagg. 92. (h) *Hamilton, deceased*, 15 Jur. 566; *Davies v. The Queen's Proctor* 2 Rob. 413.

sons equally entitled thereto, the grant is ordinarily made to the first applicant, *qui prior est tempore potior est jure*; but proof may be required that notice of such application has been given to the others (a).

The nearest and most lawful friends to whom the Statute Edw. III. directs the administration to be granted, are the next of blood who are not attainted of treason (b), or felony, or have other lawful disability (c).

An alien may be an administrator (d).

An alien.

The reason is, that he takes the property *en autre droit*, and not to his own use (*Caroon's case, supra*).

Attainder.

Insolvency seems to be no disqualification, although undoubtedly a very serious objection (e).

Insolvency.

Where there is a will, and the executors renounce, if the next of kin have no interest, he is excluded by the spirit, although contrary to the letter of the Act, and the administration will be granted to the person who has an interest in the effects (D. & B. 403).

Want of interest.

A minor cannot be administrator (f) because he cannot execute the bond which is required by the Act of Parliament (*S. C. A., sec. 61*); and also because the authority of the administrator is derived from the Statute, Edward III., which must receive a

Minor.

(a) D. & B. 401.

(b) "Except in cases of treason, or of abetting, procuring or counselling the same, no attainder shall extend to disinheriting of any heir, or to the prejudice of the right or title of any persons other than the right or title of the offender during his natural life only." (*Dom. Stats., 32 & 33 Vict., cap. 29, s. 55.*) The goods of a person attainted for high treason are not forfeited until the attainder is complete (*Eastwood et al. v. McKenzie*, 5 U. C. Q. B., O. S. 708).

(c) *Manuel deceased*, 13 Jur. 664.

(d) *Caroon's Case*, Cro. Car. 8.

(e) *Havers v. Havers*, Barnardiston, Ch. Ca. 23; and D. & B. 403.

(f) *Hensloe's Case*, 9 Rep. 36.

Under age—
under 21. legal construction, and therefore the administrator must be of age according to the contemplation of the Common Law (*a*) which is at twenty-one; “under age shall be intended under twenty-one” (*b*).

Guardian. When the person entitled is a minor, administration during his minority will be decreed to his guardian (*c*).

Feme covert Coverture is no disqualification, but as by the practice of the court the husband is required to execute the bond, a married woman is in effect disabled to take administration without his concurrence; against his will she cannot take it (*d*).

A married woman is not empowered by R. S. O. c. 125, to act as an administratrix independently of her husband (*e*).

Where the husband has been abroad, or incompetent, or where his residence was unknown, the court has allowed a stranger to execute the bond (*f*).

Where a married woman who was the sole next of kin, and the only person entitled in distribution, refused to take administration, the Court granted it to her husband; (*g*) and in an early case where administration had been decreed to the wife, and afterwards an appeal being interposed, she desired to renounce, it was held that there was a *jus acquisitum* to the husband, of which she could not deprive him (*h*).

Corporation. If a corporation be entitled to administration, the

(*a*) *Freke v. Thomas*, 1 Ld. Raym. 667. (*b*) *Beal v. Simpson*, 1 Ld. Raym. 408. (*c*) *Abbott v. Abbott*, 2 Phill. 578.

(*d*) *Bubbers v. Harby*, 3 Curt. 60. (*e*) See further as to responsibility of husband, *Balsam v. Robinson*, (Gwynne, J.), 19 U. C. C. P. 266 [1869].

(*f*) *Toller's Exors.* 91; see *Suter v. Christie*, 2 Add. 150.

(*g*) *Wenham v. Wenham* 6 N. C. 17; *Haynes v. Matthews*, 1 Sw. and Tr. 460; *Macauley v. Phillips*, 4 Ves. 19. (*h*) *De Rosa v. DePinna*, 2 Lee, 389.

grant is made to its syndic (a). As to an officer of a banking company taking administration where the company is a creditor of the deceased, *see Dresser v. Robinson* (b). Banking company.

Where an annuity was bequeathed to the preacher Patron. at Kingsland chapel, administration with the will was decreed to the patron (a).

The husband has an original right to the administration as the most lawful friend of the wife, and is not within the Statute of Henry VIII, so that, in the case of the husband the Court has no discretion (c) save such as is given by the section 54 S. C. A. Husband.

The husband's representative is passed over in cases where the 33rd section of the Imp. Wills Act (sec. 35 Wills Act of Ontario) applies. Exceptions.

Thus where a legatee died in the life time of the testator, leaving issue and her husband surviving, the latter also dying in the testator's life time, administration (limited) was granted to a son of the legatee without requiring the renunciation or consent of the husband's representative (d).

The validity of the marriage may be questioned upon an application for administration in the character either of husband or of widow (e). Validity of marriage.

But where a marriage in fact is alleged, the burthen of proving its invalidity is imposed upon those who Presumption in favour of.

(a) *Maidman v. All persons, &c.*, 1 Phill. 50 D. & B. 297, 405.

(b) 4 N. C. 44; And *In the goods of Gavin Russell, post.*

(c) *Duncombe v. Mason*, cit. by Holt C. J., 1 P. Wms. 44; *Elliott v. Gurr*, 2 Phill. 16; 29 Car. II. c. 3. It is possible now, that under R. S. O. c. 125, s. 25, as to the distribution of the separate personal property of a married woman dying intestate, a son or daughter of a married woman so dying might be held entitled to the grant in preference to the husband, as having the greatest interest.

(d) *Council, L.* R. 2 P. & D. 315.

(e) D. & B. 406.

impugn it (a); the maxim being *semper præsumitur pro matrimonio* (b).

A voidable marriage if not set aside in the life time of both parties is valid for all civil purposes; where, therefore, the deceased was the sister of a former wife, the right of the husband to administration was maintained (c) the case having arisen before 5 & 6 Will. IV. c. 31 (Lord Lyndhurst's Act).

The temporal courts in England regarded every marriage *de facto*, as good until declared void by the ecclesiastical courts, and in a case where administration had been taken by the widow, who was sister of the intestate's former wife, the marriage was held indissoluble (d).

If husband a felon,

If the husband have been attainted of felony, the Crown is entitled to the administration of his wife's effects (e).

or a lunatic,

If the husband be a lunatic, the grant, it seems, should be made to his committee (f), for the husband's right is exclusive of all others; if there be no committee, there may be a grant to the husband's use during insanity (g); the grant is in the discretion of the Court, no party being entitled to it of right (h). As to power of Inspector of Prisons and Public Charities over property of insane persons of whom he is *ex-officio* committee before grant of probate or administration, *vide* R. S. O. c. 220, s. 51.

or die before obtaining grant.

If the husband die before obtaining letters of administration, or before fully administering to his wife's effects, the grant is in the discretion of the

(a) *Ward v. Day*, 1 Rob. 759.

(b) *Smith v. Huson*, 1 Phill. 286, 294; *Diddear v. Faucit*, 3 Phill. 580.

(c) *Elliott v. Gurr*, 2 Phill. 16.

(d) Per Esten V. C. in *Hodgins v. McNeil*, 9 Gr. 305.

(e) *Coombs v. The Queen's Proctor*, 2 Rob. 547. But this case was before the Act abolishing forfeiture, (33, 34 Vict. c. 23 Imp. Stat.)

(f) See *Alford v. Alford*, Deane & Sw. 322.

(g) D. & B. 449.

(h) *Southward*, 3 Curt. 28.

Court, and where this is the case it is the almost invariable rule that the grant should follow the interests (a).

It may, therefore, be made either to the representative of the husband, or to the next of kin of the wife, according to the circumstances of the case. The next of kin of the husband, however, is not entitled to the administration of his deceased wife, unless such kinsman have clothed himself with the character of the personal representative of the husband (b).

The case of an administration with the will of the wife annexed, is not within the statutes, and if no executor be appointed, the grant is in the discretion of the Court. *Prima facie*, the husband is entitled to it (c), but it may be made to the legatees, if the Court see fit (d). The husband, however, is entitled *de jure* (e) to a *cæterorum* grant, if he think fit to take it (f).

By the statute of Hen. 8., administration may be granted either to the widow, the next of kin, or to both at the discretion of the Court. The right of the next of kin, therefore, is equal to that of the widow (g); but under ordinary circumstances the latter has always the preference (h).

For good reasons, however, the Court will pass over the widow. Thus if she have eloped (i), or lived apart from her husband (j), or contracted a

(a) *Fielder v. Hanger*, 3 Hagg. 769; *Pountney, deceased*, 4, Hagg. 289. (b) *Crause, deceased*, 1 Sw. & Tr. 148; *Jane Bell, deceased*, 7 W. R. 349; 1 Sw. & Tr. 288.

(c) *Salmon v. Hayes*, 4 Hagg. 382, see 2 Rob. 470. (d) *Brenchley v. Lynn*, 2 Rob. 441. (e) *Rex v. Bettenworth*, 2 Str. 891. (f) *Brenchley v. Lynn, supra*; see *Boxley v. Stubbington*, 2 Lee 537. (g) *Goddard v. Cressonier*, 3 Phill. 637; *Sir George Sand's case, supra*. (h) *Webb v. Needham*, 1 Add. 449, and Coote 8 Ed. 104, 199. (i) *Fleming v. Pelham*, 3 Hagg. 217n; *Lewis v. Lewis*, 1 Lee 35. (j) *Chappell v. Chappell*, 3 Curt. 429; *Lambell v. Lambell*, 3 Hagg. 568.

second marriage in his lifetime (a), or been divorced *a mensa et thoro* for adultery (b), administration has been granted to the next of kin.

Where the deceased had withdrawn himself from his wife, whose fidelity he suspected, but had left his children under her protection, it was considered that her title to the administration was not affected as against their grandfather and guardian (c).

The fact of a widow having married after the death of her husband, is no valid objection to her title (d), still if a child of the deceased, supported by the other children, apply, the fact of the widow having married again may induce the Court to grant the administration to the child in preference (e).

The trustees
under mar-
riage
settlement.

Administration was granted to trustees under the marriage settlement of the sole next of kin of the intestate, who lived separate from her husband whose address was unknown, and she, renouncing her right to the grant in favour of the trustees. Justifying security was ordered, and the trust deed to be brought into the registry for examination, to see that its contents had been correctly stated (f).

When the woman has, by her settlement or otherwise, barred herself of all interest in the property of her husband, she has no claim to the administration (g), if there be any next of kin.

Where widow
of unsound
mind.

Where the widow was of unsound mind, Sir John Nicoll in one case (h), and Sir Herbert Jenner Fust in another (i) passed her by.

(a) *Conyers v. Kitson*, 3 Hagg. 556. (b) *Davies, deceased*, 2 Curt. 628. (c) *Brown v. Brown*, 1 Spinks, E. & A. 423.

(d) *Stretch v. Pynn*, 1 Lee 30; *Webb v. Needham, supra*. (e) *Ibid*.

(f) *Maychell*, L. R. 4 P. D. 74. See also *Probart* 36 L. J. P. & M. 71.

(g) *Walker v. Carless*, 2 Lee. 560; and see 1 Lee, 35. (h) *Williams deceased*, 3 Hagg. 217; see *Oyden deceased*, 1 Spinks E & A. 113.

(i) *Dunn, deceased*, 5 N. Cr. 97.

Nevertheless, it is said in a later case (a), to be the practice to make the grant to the committee of the widow, without citing the next of kin; and Sir John Dodson, although not bound, he said, by that practice, held the committee to be preferably entitled, as the widow herself would have been.

Failing the widow, those, who at the death of the deceased were his next of kin, are entitled to the grant. After widow, next of kin.

Consanguinity or kindred is defined to be *vinculum personarum ab eodem stipite descenditum*; Consanguinity. the connection of persons descending from the same stock.

Consanguinity is either lineal or collateral:— Lineal. lineal consanguinity is that which subsists between persons of whom one is descended from the other; as between the deceased or intestate in the accompanying table and his father and grandfather in the ascending line, and his children and grandchildren in the descending line.

In matters of distribution and succession to personal estates, the degrees of relationship are computed according to the civil law (b).

The table of consanguinity, of which the accompanying is a copy, may be found in the valuable treatise of Messieurs Dodd and Brooks, and in other works on the same subject there mentioned. In reference to it, it is there observed (p. 412), that it extends to the seventh degree, the most remote that seems to have come in question in the courts, citing *Lock v. Lake, supra*, in which Sir Atwell Lake, as cousin-german twice removed, unsuccessfully contested the administration with a second cousin once removed;

(a) *Alford v. Alford*, Deane & Sw. 322.

(b) *Lock*, by her guardian, v. *Sir Atwell Lake*, 2 Lee, 421; *Mentrey v. Petty*, Prec. in Chancery, 593 (1722); and *Carter v. Crawley*, Sir T. Raym. 540; Black Com. vol. 11. p. 201.

and that the table may be easily extended, should it become necessary by the occurrence of any case of extraordinary longevity like that of the old Countess of Desmond, who could say, "Arise, daughter, and go to thy daughter, for thy daughter's daughter hath a daughter."

Collateral.

Collateral relatives descend from one common ancestor, but not the one from the other, as if John Styles leaves two sons, each of whom has issue; both these issues are descended from John Styles as the common stock or ancestor, and are collateral kinsmen to each other; because, though not descended the one from the other they are all descended from this common ancestor, and all have his blood in their veins; which denominates them *consanguineos*. The very being of consanguinity consists in this descent from one and the same ancestor (2 Black. Com. 208 *et seq.*).

In the computation of proximity of kindred, each person forms one degree.

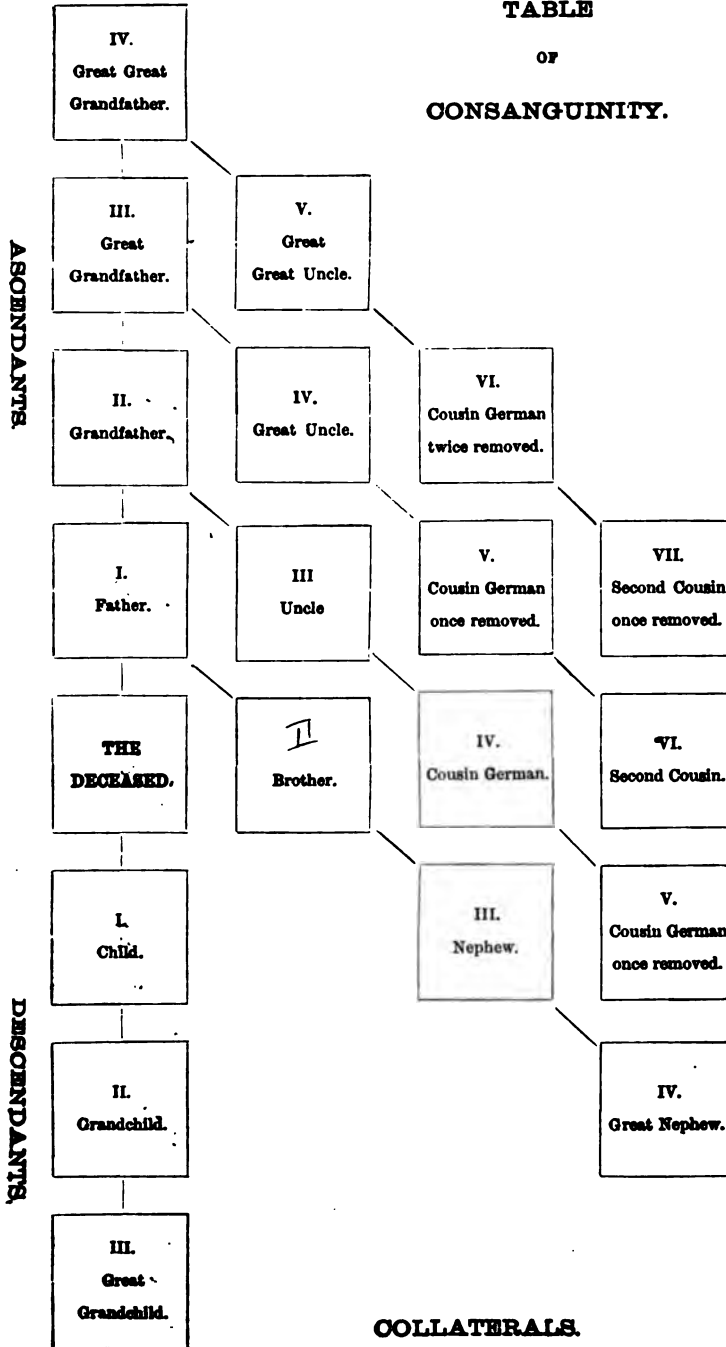
Rules of civil
law resorted
to.

For the purpose of ascertaining who among collaterals is entitled to administration, resort is had to the rules of the civil law, (a) the course is to count upwards from either party to the common stock, and then downwards to the other. Thus the deceased and his cousin-german are related in the fourth degree; because from the deceased to his father is one degree; to his grandfather, the common ancestor another; then descending to the uncle, the grandfather's son, another, and from him to his son, the cousin-german, yet another. It will be seen by the table, that the great-grandfather's father, the great-grandson's child, and the brother's grandchild, are as near akin to the deceased as his first cousin, being all in the same degree.

Computation.

(a) *Lock v. Lake*, *supra*; *Evelyn v. Evelyn*, 3 Atk. 762, and see 3 Burn's Ecc. Law, 543.

**TABLE
OF
CONSANGUINITY.**



Right to
administration
father and
mother.

Ascendants.

Divers claim-
ants as next of
kin.

Recapitula-
tion.

The right to administration belongs by the Statute to the next of kin; the father and mother, therefore being in the first degree, have a title paramount to the brothers and sisters, who are related only in the second degree. An exception, however, to the rule just stated, prevails in the case of the immediate descendants of the deceased; for not only his children, but his most remote posterity, are preferred to all ascendants as well as to all collateral kindred.

When divers persons claim the administration as next of kin, who are of equal degree of kindred, the Court may accept any one of them; although grandparents, and brothers and sisters are in the same degree of kindred, the latter by the practice of the Court, have a preferable title (*Vide, Evelyn v. Evelyn, supra*).

The following is the order in which administration is usually granted:—

1. Husband or wife.
2. Child or children.
3. Grandchild or grandchildren.
4. Great grandchildren or other descendants.
5. Father.
6. Mother.
7. Brothers, sisters.
8. Grandfathers or grandmothers.
9. Nephews and nieces, uncles, aunts, great grandfathers or great grandmothers.
10. Great nephews, great nieces, cousins-german, great uncles, great aunts, great grandfather's father, and so on according to the proximity of kindred; all those who are in the same degree being equally entitled (a).

Grants to per-
sons entitled
in distribution.

Administration will be granted to any of these persons, not being next of kin, on the ground of

(a) *Vide* the accompanying table.

their having an interest in the intestate's estate, if the widow and next of kin have renounced or be all dead. In the latter case, persons entitled in distribution (as the Ecclesiastical Court called, and the Court of Probate still calls them) are also allowed a preference over the legal personal representatives of the next of kin.

If the widow, next of kin, and all other persons entitled to share distributively, be dead, administration will be granted to the legal personal representatives of any one of them, for in such a case they all rank equally. In this case the statute is disregarded, as applying only to the living, and notice is taken only of the beneficial interest which has been transmitted to the representatives.

To legal personal representatives of widow or next of kin, &c.

The executor or administrator of a deceased person, who was entitled to the whole of an intestate's property, is also entitled to a grant of administration as fully as such deceased person would have been if living (a).

It is the practice to allow one of two executors to take administration to a deceased, whom their testator was entitled to represent (b). But this is not applied to the case of co-administrators. They should take administration under such circumstances jointly (c), but in practice, any one of two or more co-administrators is allowed to take administration on the non-acting administrator or administrators renouncing or consenting (d).

Distinction between co-executors and co-administrators.

On the ground of interest, administration will be granted to a person having an indirect and derivative interest in an intestate's estate, as being one of the next of kin, or the residuary legatee of a next of kin of the intestate. But the applicant must be

To persons having a derivative interest.

(a) *Coote*, 8th ed. 110.
(c) *F. Naylor*, *supra*.

(b) *F. Naylor*, *supra*.
(d) *Coote*, *supra*.

unable to become the personal representative of his own deceased, through the latter being already legally represented, and such legal representative refusing to take the requisite grant.

So, administration has been granted of a wife's estate to the residuary legatee of the husband, on the executor, who has proved the will of the latter, renouncing administration (*a*).

To next relatives who have *spes successionis*.

On the renunciation and consent of the father of an intestate who has died a bachelor, administration will be granted to his brother, though he has no interest in the estate. It is so granted on the principle that the intestate's brother may be considered to have indirectly, as his father's next of kin, a *spes successionis* to the property in question. He may also, and not unfairly, be regarded in the light of his father's attorney or agent.

To a brother or sister.

On the same grounds, also, administration will be granted to the sister of the deceased.

To a nephew, having *spes successionis*.

On the same principle, the court has granted administration to a nephew, who was not entitled in distribution (*b*).

In *Keane's case* the Court granted administration to a nephew, being the son of the deceased's brother, who was the sole next of kin, and only person entitled to the personal estate of the deceased, on the renunciation and consent of that brother (*c*).

In *Belgrave's case* (*d*), the Court granted administration to the son of a deceased brother, who was the sole next of kin, on the renunciation of his executrix and universal legatee, and of certain nephews and nieces entitled with him in distribution. The Court said, "Though the party had not a direct interest, he is acting under a person entitled to a moiety in the property."

a Coote, 110.

(*c*) *Mary Keane*, 1 Hagg. 692.

(*b*) *Ib.* 111.

(*d*) *A. Belgrave*, 2 Hagg. 83.

In *Jane Bell* (a), the husband's second wife applied for administration of the estate of the deceased (the first wife) on the renunciation of the husband's administrator (a creditor); but the Court was reluctant to put the first wife's estate into the hands of the second wife, and held the children of the former entitled to the grant.

The principle which governed the Court in making the grants in *Keane* and *Belgrave* is not distinctly stated, but would seem to be this:—the grant is not made to the applicant as being the deceased's nearest relative after the renunciant, but as having a *spes successionis* to the deceased's property, though remote and indirect, through the next of kin. *Spes successionis* how shown.

In an unreported case stated by Mr. Coote, a nephew of the intestate applied for administration on the renunciation of the widow and daughter. But the Court rejected the application, on the ground that the nephew's chance of succeeding to any part of the deceased's estate, as being through his cousin, the daughter, "was too remote and contingent to be considered an interest in the deceased's estate, and that he could not, by any fiction of law, be held to be the daughter's natural agent" (b). What is not a *spes successionis*.

So, in *Gibbon*, the Court refused to grant to a nephew of the intestate's next of kin, but allowed the daughter of the latter to take administration (c).

If there be no kindred the Crown is entitled to the administration which is granted to her Majesty's nominee, usually the solicitor to the treasury, in Ontario, the Attorney-General, for the time being, and his successors in office (d). The Crown.

A bastard, being *nullius filius*, can have no kindred, but the offspring of his own body, and if he die

(a) 1 Sw. & Tr. p. 238.

(c) *Ibid.*

(b) *Coote*, 112.

(d) *See* R. S. O. c. 60.

without wife and without issue, his effects belong to the Crown as *bona vacantia* (a).

The same rule applies where the next of kin is unknown, for the Crown has a right to the custody of the property till a better title is shown (b).

Notice to the
Att'y.-Gen.

Following the E. C. P. practice as it stood 5 Dec 1859 :—Where application is made for letters of administration (either with or without a will annexed) of the goods of a bastard dying a bachelor, or spinster, or a widower, or widow, without issue, or of a person dying without known relations, notice of such application is given to her Majesty's Attorney General for Ontario, in order that he may determine whether he will interfere on the part of the Crown and no grant is issued until the officer of the Crown has signified the course which he thinks proper to take (c).

In the case of persons dying intestate without any known relation, a citation is issued against the next of kin, if any, and all persons having or pretending to have any interest in the personal estate of the deceased.

Such citation must also be served upon the attorney-General in addition to the service by advertisement provided for by S. C. Rules 25 & 26.

Person dying
in itinere.

Where a foreigner dies here *in itinere* the Court, though not claiming the administration, has a duty to see that the property of a person dying in foreign parts gets into proper hands (D. & B. 415). The law of England does not recognise in the attorney-General of the country of the domicile any right to take possession of the goods of the deceased.

The most remote relation will defeat the

(a) *Dyke v. Walford*, 5 Moo. P. C. C. 434, 6 No. Ct.

(b) *Rutherford v. Manley*, 4 Hagg. 214; *Kane v. R. G.*, M. & G. 565; and see *Att. Gen. v. Kohler*, 9 H. L.

(c) *Horsely*, 249.

title, and in a contest with the Crown it is not necessary for the claimant to set forth his pedigree, or to show in what degree of kindred he stands to the deceased. It is sufficient for him to prove that the intestate recognised him as a kinsman (*a*).

The right of the Crown is said to be founded, not upon any Statute, but upon the principle which, where the Statute law is silent, gives the administration to those who have the beneficial interest in the property.

Therefore, where by the law of the domicile the effects belong to a foreign Government, the grant will be made to an agent of that Government (*b*) or to its Consul General (*c*).

Where a person dies, leaving a widow, and there are no persons who answer the character of next-of-kin to him, *e. gr.*, where a husband who is illegitimate dies without issue, the widow takes one moiety of his personal estate, and the crown is entitled to the other (*d*).

When the Crown administers to a bastard, it takes The Crown. the property beneficially, and is accountable to no one (*e*), but when it takes the grant solely in the absence of next of kin, it takes only as a trustee for the parties who may eventually establish a title to it, and its nominee is accountable like any other administrator (*f*).

In practice, however, the Crown of its bounty in- Bounty of. variably divides the effects among the natural relatives of the deceased retaining a certain percentage only for its own use (D. & B, 517).

(*a*) *Stole v. Tyndall*, 2 Lee 394; see *Bouchier v. Horngeld*, 2 Lee 513, where kindred was established by mutual ownings, (*b*) *Sidi Hamet Benamor Beggia, deceased*, 1 Add. 340. (*c*) *Aspinall v. The Queen's Proctor*, 2 Curt. 241. (*d*) *Cave v. Roberts*, 8 Sim. 216 (1836). (*e*) *Dyke v. Walford*, 5 Moo. P. C. C. 434. (*f*) *Turner v. Maule*, 5 De G. & Sm. 497; *Kane v. Maule*, 23 L. J. Ch. 638; *Edgar v. Reynolds*, 6 W. R. 404.

The Crown.

In the British Parliament, in February, 1877, Mr. Smith, Secretary to the Treasury, in reply to an enquiry *in re estate of William Paterson*, which had fallen to the Crown as *ultima hæres*, stated the general principles on which the Treasury proceeded in dealing with such cases, as follows: "The Treasury, in considering, first of all, the claim of any individual, inquired whether there was any evidence either by an informal will or otherwise of an intention to make provision for that individual. Then they considered further whether a strong claim existed on the part of individuals with regard to whom there was no such evidence. Then they proceeded to consider what would have been the disposal of the property, supposing the deceased had been legitimate, and they followed the principles laid down by the law, for distribution of property in the case of legitimate persons who died intestate. It was to be understood that the Treasury was simply the trustee of the Exchequer in this matter." *Hansard*, cccxxii. p. 895.

In re Estate of Andrew Mercer, deceased, without known relatives, the Ontario Government (1878) made an allowance approaching to about one-fourth of the intestate's estate to the person having a natural claim; the greater part of the balance being devoted to public charities. (*Vide Ont. Stats.* 1878.) A paper writing had been propounded in the Surrogate Court, County York, as the will of the deceased, by the persons named in it as executors; a caveat was entered on behalf of the Attorney-General, and an order obtained for the removal of the cause to the Court of Chancery; the general result of the issues directed to be tried and the proceedings had in that Court being that the deceased was declared to have died intestate, and without known relatives, and that his property had escheated to the Crown (a).

Creditors.

Administration is only granted to a creditor failing

(a) And *vide Unwin v. Atty.-Gen. ante*.

any other representative (a); his right is founded solely in this—that he cannot recover his debt until a representation be made to the deceased (b).

The affidavits should show the manner in which the debt arose (*Fairweather*, 2 Sw. & Tr. 588).

The Court never grants administration to a creditor, so long as a party having a prior title is willing to take it (c).

Administration cannot be granted to a person as creditor who is entitled as next of kin (d).

A creditor can neither deny an interest, nor oppose a will, nor require sureties to justify (e).

The principles by which the former Court of Probate for Upper Canada was governed, in reference to the right of a creditor to a grant of administration are clearly set forth in the judgment of the learned Judge of that Court (*Official Principal S. Brough*), *In the goods of Samuel Young, deceased*, 1853, as follows:—"Mr. Whittemore is the largest creditor, and took the first proceeding in court towards obtaining administration, and Mr. Allen relies upon the consent of the intestate's widow and brother (the intestate's children being all infants).

Administra-
tion to cre-
ditors.

"No disqualification, or even objection on the score of fitness attaches to either applicant; and each party is ready to furnish the requisite security and to enter into an undertaking to pay rateably all the creditors according to their rank.

* * * * *

"How am I to determine my selection for the office? Mr. Whittemore as the creditor of the largest amount

(a) *Webb v. Needham*, *supra*; *Dimes v. Cornwall*, 2 Rob. 142; *Burroughes v. Griffith*, 1 Lee, 542. (b) *Elme v. Da Costa*, 1 Phill. 173. (c) *Graham v. McLean*, 2 Curt. 559; *Jones v. Beytagh*, 3 Phill. 635. (d) *Corser*, 31 L. J. P. & M. 170; *Wingfield v. Wingfield*, 1 Lee, 340. (e) *Haynes v. Matthews*, 1 Sw. & Tr. 462.

is to be preferred *cæteris paribus* to a creditor in a less amount (a).

"But what weight is to be given, on the other hand, to what is produced as the consent of the widow and brother of the intestate? The wish of the latter is not entitled to any attention, for he had no interest, and besides he only says in effect that he is content that Allen should be appointed administrator, if the proper authorities think fit. As to the wish of the widow as expressed in one of the papers produced, it does not contain any satisfactory ground for her preference; on the contrary, it is calculated to excite suspicion, that the reasons for her preference may have been such as would not be a recommendation in the estimation of the Court. But at all events, the estate being very insolvent, the widow has, in fact, no interest. She has, by the Statute, the right to administer, but that is all. The Court is not bound to regard her wishes; if it were, then a total stranger not a creditor, who was her nominee, should be preferred to a creditor. But by the interpretation of the Common Law Courts, as well as of the Spiritual Courts, the object of the Statutes of Administration is to give the management of the property to the person who had the beneficial interest in it, so much so that the words of the Acts have been disregarded in order to give effect to this principle (b). Mr. Allen, then, must rest on his interest as a creditor. But on the principle already referred to, that the person having or representing the largest interest is preferred, Mr. Whittemore is entitled.

Beneficial
interest.

* * * * *

"I think, therefore, Mr. Whittemore entitled to the

(a) Referring to *Kearney v. Whittaker*, 2 Lee, 324; *Carpenter v. Shelford*, ib. 502; and to

(b) *Wetdrill v. Wright*, 2 Phill. 248; *West v. Weby*, 3 Phil. 381
Young v. Pierce, 1 Freem. 496.

grant of letters of administration, but he must file an affidavit which is usual in like cases, stating the nature of the security (if any) which he holds for his debt. If no objection arises on this head, let letters go on his giving the proper security and entering into articles to pay creditors rateably according to their degree" (a).

To secure the general body of creditors, it is now the practice that every creditor administrator must, before taking administration, enter into a bond, with two sureties, to pay the other creditors *pro rata* (b). Bond to pay
pro rata.

It was said by Lord Mansfield that no next of kin ever struggled for the administration of an insolvent estate with an honest view (c). Insolvent estate.

Administration has been granted to the antenuptial creditor of a married woman, her husband having been first cited (d). Ante-nuptial creditor.

A person who has paid the funeral expenses of the deceased has been permitted, as a creditor, to cite the next of kin; but an administration will not be granted to an undertaker as a creditor (e).

Administration has been granted to the official assignee of a deceased bankrupt (f); but where a person had simply bought up a debt due from the intestate, Sir John Dodson observed that it would be a dangerous practice to decree administration to a person who had bought up a debt after the death of the intestate, especially where, as in the case be- Official Assignee.
Person who has bought up debt.

(a) See also *In the goods of Garin Russell, deceased*, Court of Probate, U.C., 1853, a bond to pay *pro rata* was required from a creditor administrator. (b) Coote, 8th ed. 112, citing *Brackenbury*, L. R. 2 P. & D. 273; 36 L. J. 744; 25 W. R. 698.

(c) *Archbishop of Canterbury v. House*, Cowp. 144.

(d) *Huddleston v. Huddleston*, 2 Rob. 424, 1852.

(e) D. & B. 417; but see *Newcombe v. Beloe*, L. R. 1 P. & D. 315.

(f) *Belcher v. Maberly*, 2 Curt. 629; *Downward v. Dickenson*, 34 L. J. P. & M., 4.

fore him, the assets considerably exceeded the amount of the debt (*a*).

A co-partner, or co-trustee, of a person who was joint assignee with the deceased is not entitled to administration as a creditor (*b*).

Creditor must cite, &c.

Before a creditor can become administrator he must cite all persons who have a prior title to the grant, whether as executor or next of kin, or entitled in distribution.

Affidavit.

Sir C. Cresswell refused to grant administration to a creditor because, although it appeared from the affidavit that the son of the deceased was the sole next of kin, it did not appear that he was the only person entitled in distribution. It was consistent with them that the deceased might have left grandchildren. The reporter adds that motions have been repeatedly rejected for this defect (*c*).

The practice of the Court of Probate required that wherever practicable the service of the citation should be personal (*d*).

Intestate without known relatives.

Advertisement.

In the case of persons dying intestate without any known relation, advertisements for next of kin are to be inserted in such newspaper, local, British or foreign, as the Judge may direct (S. C. R. 25 and 26). The Judge will also direct how often, and at what intervals, they shall appear; and where application is made for letters of administration, either with or without a will, of the goods of a person who leaves neither husband, wife nor issue, or of a person dying without any known relation, notice of such application must be given to the Attorney-General, in order that he may determine whether it will be

(*a*) *Baynes v. Harrison*, Deane & Sw. 16; *Macmin v. Coles*, 33 L. J. P. & M. 175; *Downward v. Dickenson*, *supra*; see, also, *Depit v. Delevigne*, 30 L. J. P. & M. 86.

(*b*) D. & B. 418, *cas. cit.* (*c*) *Brown v. Wildman*, 28 L. J. P. & M. 54. (*d*) Coote, 8th ed. 236.

expedient to interfere on the part of the Crown (a). If the Attorney-General, after notice, neither assent nor object to the grant he must be served with a citation (b).

When the persons who have an interest are known they must, if possible, be cited personally.

If there be a will the executors should be cited to accept or refuse probate; or if, no executors be named, the legatees, the widow, and the next of kin should be cited to take administration with the will annexed.

In the case of intestacy, the citation usually calls upon all persons in general (c), and the widow and next of kin in especial, to take out letters of administration or show cause why they should not be granted to the creditor applying, upon his giving usual security (d).

If a person entitled appear to the citation, he will be preferred to the creditor; but if he have unduly delayed, the creditor will be entitled to his cost (e).

When the grant is in the discretion of the Court, no party being of right entitled to it, the citation of those who have an equal, or even a preferable claim, may be dispensed with (f).

If administration be decreed to a next of kin, he may be assigned to take it out within a limited time and his neglect to do so may be taken as a renunciation (g).

Upon the return of a citation issued on behalf of

(a) Coote, 87; D. & B. 419.

(b) *Hamilton, deceased*, 15 Jur. 566; *Colvin v. H. M. Proctor Gen.* 1 Hagg. 92; *In goods of H. M. George III.* 1 Add. 255.

(c) *Atkin v. Ford*, 3 Hagg. 193; *Miller v. Washington*, Ibid. 277; see *Colvin v. Fraser*, 1 Hagg. 107.

(d) *Maidman v. All persons in general*, 1 Phill. 51.

(e) *Cole v. Rea*, 1 Phill. 428, (delay of six months).

(f) *Southmead*, 3 Curt. 28; *Middleton*, 2 Hagg. 60.

(g) *Nevin v. Nevin*, Milw. 569; *Crane v. Rebello*, 16 Jur. 482.

one creditor, it is not uncommon to grant the administration to another.

Justifying
security.

Upon the application of a creditor for administration, justifying security is called for at the Judge's discretion according to the circumstances of the case; save that there is one general rule that in all cases where there has not been a personal service of the citation the sureties shall justify, and from this the Court is reluctant to depart (a).

Special cir-
cumstances.

Since the S. C. Act, sec. 54 (1858), where the insolvency of the estate or other special circumstances make it necessary or expedient to pass over the person *prima facie* entitled to the grant it may be committed to any other person with such limitations as may be thought fit.

Administra-
tion to nomi-
nee of judge.

If neither next of kin, nor the Crown, nor even a creditor can be found to take administration, the Judge may grant it to a nominee of his own, as the ordinary might have done before the Statutes fettered his discretion, or he may grant to a third person letters *ad colligendum* (b), or may take the effects into his own hands and apply them in a due course of administration, but neither the Judge nor the person to whom such letters have been committed, can sell any goods though there were danger of their perishing (c).

Distribution.

ADDITIONAL NOTE.—A.

The distribution of the personal estate of intestates in Ontario is governed by 22 & 23 Car. II. c. 10, 29 Car. II. c. 3, 1 Jac. II. c. 17, and R. S. O. c. 126 sec.

(a) *Belcher v. Maberly*, 2 Curt. 629.

(b) *Radnall, deceased*, 2 Add. 232 (1824).

(c) D. & B. 425.

25, according to the table set forth in the following pages, as modified by the statute last mentioned.

The degrees of relationship are for the purpose of distribution computed in the same manner as for the purpose of the grant of administration (D. & B. 508). In neither case is there any distinction between the whole blood and the half blood (*Croke v. Watt*, 2 Freem. 112), and dignity of blood gives no preference (*Moore v. Barham*, *supra*.)

The following simple table of the distribution of the personal estate of an intestate is contained in the treatise of Messrs. Dodd & Brooks, who refer to Mr. Paterson's "Compendium of English and Scotch Law," p. 252, where a similar table is to be found.

The persons named under one number, except the wife, all take equally, and must all be dead before those named in any following number can succeed. If there be no wife, the persons here stated to be entitled to the residue will, of course, take the whole.

	1. Husband	The whole(a)
	2. Wife	One-third.
	Children, <i>per capita</i>	} The residue.
	and Issue of deceased children, <i>per stirpes</i>	
	3. Wife	One-third.
	Grand-children, <i>per capita</i>	} The residue.
	and Issue of deceased grand-children, <i>per stirpes</i>	
First degree	4. Wife	One-half.
	Father	The residue.
	5. Wife	One-half.
Second degree.	Mother, brothers and sisters, <i>per capita</i>	} The residue.
	and Children of deceased brothers and sisters, <i>per stirpes</i>	

(a) By the R. S. O. c. 125, sec. 25, it is enacted that the separate personal property of a married woman dying intestate shall be distributed in the same proportions between her husband and children, as the personal property of a husband dying intestate is to be distributed between his wife and children. And if there be no child or children living at the death of the wife so dying intestate, then such property shall pass or be distributed as if that Act had not been passed.

And *vide* Leith's Blackstone, 170.

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	6. Wife	On
Second degree.	Grandfathers and grandmothers	Th
	7. Wife	On
Third degree.	Great-grandfathers and great-grandmothers	Th
	Uncles and aunts	
	Nephews and nieces, <i>per capita</i>	
	8. Wife	On
Fourth degree.	Great-great-grandfathers and great-great-grandmothers	Th
	Great-uncles and great-aunts	
	Great-nephews and great-nieces	
	and Cousins-german, <i>per capita</i>	On
	9. Wife	
Fifth degree.	Great-great-uncles, and great-great-aunts	Th
	Children of great-uncles and great-aunts	
	and Children of cousins-german, <i>per capita</i> (a)	

To the above it may be added, that if the wife and no next of kin, or the intestate be a lone one half goes to the wife and the other half Crown (*vide ante*, p. 221).

Administration Bonds.

The following was the common form prescribed by the E. C. P., Dec. 5, 1859, as to administration bonds:—

Administration bonds. “ Administration bonds are attested by
Attestation of. of the Principal Registry, by a District Registrar
by a commissioner or other person, authorized to administer oaths (b), under 20 & 21 Vic. c. 7
23 Vic. c. 95; but in no case are they to

(a) Distribution *per capita* is where the claimant takes his share in his own right, and not as representing another; as, if three brothers of the intestate, when the effects are divided, one to each. Distribution *per stirpes* is where the claimant takes his share as a representative, as, if the deceased had three brothers, and A. be dead, leaving children; in this case, the effects shall be divided into three equal parts, of which B. shall take one part *per capita*; and the third part shall be divided among the children of A., who take his share *jure representationis* as a representative, and standing in his place. (2)

(b) *Vide* sec. 23 S.C. Act.

by the proctor, solicitor, attorney, or agent of the party who executes them. The signature of the administrator or administratrix to such bonds, if not taken in the Registry, must be attested by the same person who administers the oath to such administrator or administratrix.

"In all cases of limited or special administration, In limited or special grants, two sureties. two sureties are required to the administration bond (unless the administrator be the husband of the deceased or his representative, in which case but one surety is required), (a) and the bond is to be given in double the amount of the property to be placed in the possession of or dealt with by the administrator by means of the grant. The alleged value of such property is verified by affidavit, if required."

"The registrars are to take care (as far as possible) Sureties to be responsible. that the sureties to administration bonds are responsible persons" (b).

The following further rule was introduced by the E. C. P. Rules of 1862:—

"When any person takes letters of administration in default of the appearance of persons cited, but not personally served, with the citation, and when any person takes letters of administration for the use and benefit of a lunatic or person of unsound mind, unless he be a committee appointed by the Court of Chancery, a declaration of the personal Affidavit as to estate. estate and effects of the deceased is filed in the Registry, and the sureties to the administration bond Justification. must justify" (c).

A similar practice is provided by S. C. Rules 27, S. C. Rules as to same. 28, and 30 *ante*; but, instead of a declaration, an affidavit of the personal estate and effects (Form 10) is

(a) The words in parenthesis introduced by Rules of 1862.

(b) Horsey, pp. 239, 319.

(c) Coote, 370.

to be filed, and the sureties are required in all cases to justify. For statutory provisions as to administration bonds, see sections 38, 60, 61 & 62, S. C. Act, *ante*.

Bond by
foreigners.

An administration bond was allowed to be executed by foreigners resident abroad, upon proof that the administrator was unable to obtain sureties resident in England, that the deceased had no debts unpaid, and that the person on whose behalf the letters of administration was applied for was solely entitled to the estate in that country (*a*).

SECTION II.

Administration with will annexed (b).

When admin-
istration *cum*
test. annexo
granted.

If a man die leaving a will affecting personal estate, but without appointing an executor, or if the executor renounce, or be abroad, or incapable to act by reason of insanity, or infancy, or otherwise, or die without proving the will, or if there be special circumstances within the meaning of section 54, S. C. Act, administration may be granted with the will annexed.

When there is an executor able and willing to act, who is out of the jurisdiction, he is entitled in the first place, and administration will be granted to his attorney limited *durante absentia* (*c*).

If *non compos mentis*, administration may be committed to his committee, during his insanity; if an infant, to his guardian, during his minority (*c*).

Who entitled.

If the surviving executor, being cited, decline to

(a) *Fernandez*, L. R. 4 P. D. 229.

(b) *Vide* S. C. Act, secs. 52 & 53, *ante*.

(c) D. & B. 430.

take the administration, there is an end of his claim ; and the grant will be made to the residuary legatee ^{Residuary legatee.} as the next person to the executor in the testator's election (a).

The same rule applies to a residuary legatee in trust (b).

It is no answer to his claim to say that there is no residue, and that, consequently, the residuary legatee has no interest (*Atkinson v. Barnard, supra*).

If a residuary legatee, beneficially interested, survive the testator and die, his personal representative will be entitled (c).

But the personal representative must first obtain probate or administration to the residuary legatee (d).

A residuary legatee is understood in the registry to mean a legatee of the whole of the testator's personalty, save a certain legacy or legacies, or the testator's debts (Coote, 8th ed., 64 in note).

If the deceased were a bare trustee, the practice ^{*Cestuis que trust.*} in ordinary cases is to commit the administration to the *cestuis que trust* (e).

A person to whom the universal legatee of the deceased had assigned all her property was allowed to take administration with the will annexed, there being no executor (f).

The Court is not bound to grant administration to the residuary legatee (g).

(a) *Kooystra v. Buyskes*, 3 Phill. 531; *Bigg v. Keen*, 1 Lee, 124; *Cunningham v. Ross*, 2 Lee, 478; *Linthwaite v. Galloway*, 2 Lee, 414 (1757); *Taylor v. Diplock*, 2 Phill. 27 (1815); *Smith v. Wilby*, 3 Phill. 381.

(b) *Poyer, deceased*, Deane & Sw. 184 (1856).

(c) *Jones v. Beytagh*, 3 Phill. 635 (1821); *Wetdrill v. Wright*, 2 Phill. 247 (1814); *Steadman, deceased*, 2 Hagg. 59.

(d) *Allen, deceased*, 3 Sw. & Tr. 560.

(e) *Hutchinson v. Lambert*, 3 Add. 27 (1825); *Poyer, deceased, supra*.

(f) *Vincenze Frederici*, 1 E. & A. 100.

(g) *D. & B.* 431.

Next of kin. If there be no residuary legatee there is room for the next of kin (*a*), for then they are the persons interested in the residue. Failing the residuary legatee and kinsmen, the grant will be made to a specific or pecuniary legatee (*b*), or to a creditor (*c*).

Residuary legatees. The English Court of Probate, in making grants to residuary legatees, acted, and the present Court there now acts, upon the principles or rules following:—(*d*)

If several residuary legatees. If there be several residuary legatees, any one may take, without the consent of, or notice to, the others.

If the residue be given to two persons, and the share of one of them has lapsed to the testator's next of kin, a grant is made indifferently to the residuary legatee, or to the next of kin, whichever first applies.

If there be a residuary legatee taking one portion of the residue absolutely, while a life interest is given to another in the remaining portion of the residue, the grant will be made to the one or the other indifferently, according as either applies first, in cases where there is no contest before the Court.

If one or more be dead. If two or more persons have been appointed residuary legatees, the personal representative of any one of them who may be dead will not be allowed to take unless the other residuary legatee or legatees are also dead, or renounce, or have been cited.

Their representatives. If all the residuary legatees be dead, the representative of one has no preference over the representative of another.

The representative of a residuary legatee for life has no interest (*e*).

(*a*) *Kooystra v. Buyskes*, *supra*; *Ludlow, deceased*, 1 Sw. & Tr. 29. *Watson, deceased*, *ib.* 110.

(*b*) *Hinckley, deceased*, 1 Hagg. 477.

(*c*) *Snape v. Webb*, 2 Lee 411 (1757); *Kooystra v. Buyskes*, *supra*.

(*d*) Cooté, 8th ed. 66.

(*e*) *Wetdrill v. Wright*, *supra*.

If the residue be left to such only of the testator's children as shall attain the age of twenty-one years, so as not to vest until then, but the interest and profits be directed in the meantime to be applied to their maintenance, the Court will make a grant to their guardian; and will do so in preference to making a grant to a residuary legatee substituted on the contingency of all the other residuary legatees dying before their legacy shall have vested (*a*). If residue to children on attaining age.
Grant to guardian.

If no residuary legatee has been appointed in explicit terms, administration (will) is occasionally granted to the principal legatee (*b*). If no residuary legatee.

If the residue be not disposed of, or the bequest of the residue has lapsed, administration (will) is granted to the testator's widow. If residue not disposed of or lapsed.

If there be no widow, or if there be one, and she has renounced, or died since the testator's decease, the like grant is made to the testator's next of kin. If no widow, &c.

If the residuary legatees cannot be found or heard of, the Court will grant to the testator's widow, or to his next of kin (*c*). If residuary legatee cannot be found.

If a residuary legatee has assigned all his right and interest in and to the residuary estate, the assignee on the renunciation or refusal of the executor and the residuary legatee may take administration (will) (*d*). If his interest assigned.

The grant is also made to a pecuniary or a specific legatee on the renunciation or refusal of the residuary legatee, or by his consent only. Also, if the residue has lapsed, or is undisposed of in the will, a grant will be made to a legatee on the renunciation or refusal of the next of kin, and the persons entitled under the Statutes of Distribution (*e*). Grant to pecuniary legatee.
And if residue lapsed.

(*a*) Coote, 8th ed. 66. (*b*) *Hurrell v. Hurrell*, 1 Lee, 168 (1752).
(*c*) *Cull v. Guillerme*, 12 Jur. 966 (1847). (*d*) *Mary Newstead*,
1 Curt. 593.
(*e*) *Jenny Watson*, 1 Sw. & Tr. 111.

Court couples
the grant with
the interest.

As a general rule, in all grants the Court follows the beneficial interests.

To couple the grant, with interest is, for the most part, one of the leading principles of the Court; and one of the safest principles on which it can go (*a*).

The exception to this general rule is, when there is a statutable right.

To husband on
legatees being
cited.

Administration (will) of a *feme covert* is granted to the husband, or his personal representative, on the legatee under the will renouncing or being cited (*b*).

Spes succes-
sionis.

The Court will grant administration (with the will annexed) to a person having a *spes successionis* (*c*).

Administration (with the will annexed) has been granted to the next of kin of the next of kin to the testator—the latter, who, as the grandmother and sole next of kin took the lapsed residuary estate, renouncing and consenting (*d*).

SECTION III.

Joint Grants.

Joint grants.

Joint grants are made not only to several executors, but also to residuary legatees in trust, and to testamentary guardians.

But the Court, as already seen, prefers a sole to a joint administration (*e*).

Priori petenti.

And, acting upon this principle, it grants administration *priori petenti*, *i. e.*, to that next of kin, or to

(*a*) *Brenchley v. Lynn*, 16 Jurist, 226, and 2 Rob. 470.

(*b*) *Dempsey v. King*, 2 Rob. 397; *M. Bailly*, 2 Sw. & Tr. 136 (1861).

(*c*) Coote 71.

(*d*) *Hinckley*, 1 Hagg. 477.

(*e*) *Ante*, p. 204.

that residuary legatee (where there are several) who first applies (a).

And inasmuch as the Court grants to such applicant the *universum jus successionis*, it cannot reserve power to others equally interested in the estate, nor can it make a further grant until the death of the administrator leaves the estate again vacant. The consent or renunciation of the other next of kin is not required, the superior diligence of the first applicant entitling him to preference (b).

But it is obvious that one next of kin, or one residuary legatee, will not, on all occasions, be able to snatch a grant, or even be willing to do so, for there may be others in the field who are desirous of being joined. In such a case the Court will join them in the same administration (b).

A joint grant may be made to a residuary legatee, and to the guardian of another residuary legatee, or to a residuary legatee and the attorney of another residuary legatee; or to the residuary legatee for life, and the substituted residuary legatee (b).

If both are willing, the Court will join a widow with one of the next of kin (c). To widow and next of kin, &c.

But in the case of the next of kin, an affidavit must be made by the widow, showing her knowledge of her right to take administration solely. And all the other next of kin must consent that the grant shall be so made (b).

The Court will join two next of kin of equal degree, though of different denominations, *e.g.*, a great niece and a cousin german; but under special circumstances only. And on an affidavit showing a reason for it, a grant will be made to a next of kin of a minor, and a stranger, jointly. Next of kin of different denominations joined.

(a) *Cordeux v. Trasler*, 4 Sw. & Tr. 51.

(b) *Coote*, 8th Ed. 196.

(c) But see *Newbold*, 1 L. R. P. & D. 286; 36 L. J. P. & M. 14.

Upon cause shown by affidavit, the next of kin of an infant, and a stranger, may be assigned as joint guardians, for the purpose of taking a grant for his use (a).

The Court will do what has been stated, under the ordinary powers which belong to it (b).

And in special circumstances.

But under special circumstances, and being convinced that there exists a necessity for so doing, the Court will, by virtue of sec. 54, S. C. Act, join parties not otherwise joinable (c).

In the absence of any special circumstances, joint grants have been refused to the widow and the guardian of the intestate's children (d); to a widow and a person entitled in distribution (e), and to a nephew entitled in distribution, and another nephew not so entitled (f).

When co-executors, or co-administrators, swear the estate under different amounts, probate or administration is granted to both or all under the higher sum (g).

The administration accrues to the survivor, and until his death no further grant can be made (h).

The grant to a married woman is made to her solely, and does not survive to her husband if she predeceases him (i).

SECTION IV.

Principles on which Court selects.

Selection by the Court.

Upon the power of selection, and the principles

(a) Coote, 8th Ed. 196.

(b) *Ib.* 197.

(c) *Grundy*, L. R. 1 P. & D. 459.

(d) *Richards*, L. R. 2 P. & D. 217.

(e) *Browning*, 2 Sw. & Tr. 634.

(f) *Richardson*, L. R. 2 P. & D. 245, 246.

(g) *Bell*, 2 L. R. 248.

(h) Coote, 8 Ed. 198; (i) *Ib.*

which govern its exercise by the court, the following may be added to the cases already mentioned (a).

If the next of kin contest administration with the widow, it is incumbent on them to show unfitness on her part before a grant will be made to them (b).

Otherwise, in order to be able to contest a grant the parties contending must be *in eodem gradu*, and they must be in a position to take the grant which they seek to have disallowed to the other. They must be next of kin contending against next of kin, or residuary legatees contending against residuary legatees (c).

Objection may be taken against an applicant for administration on the grounds *inter alia* of bankruptcy or insolvency (d) or extreme want of health; and if these grounds be satisfactorily established, the Court will exclude the objectionable applicant and give administration to the other party.

If the next of kin be a married woman, objection may be taken to her husband (e).

Where a question was likely to arise between the estate, and the son of one of the applicants respecting the validity of a gift, the Court excluded that next of kin, on the ground that the claim of the estate might not be strongly asserted by the father against his son (f).

The Court will not join a married woman, when, by so doing, it may defeat a trust created for her by the testator, by giving her the property in question which she and her husband may dissipate (g).

(a) *Ante*, p. 204, *et seq.*

(b) *Stretch v. Pynn*, 1 Lee, 30; *Walker v. Carless*, 2 Lee, 560; *Dew v. Clark*, 1 Hagg. 311; *Anderson*, 3 Sw. & Tr. 490; *Atkinson v. Lady Ann Barnard*, 2 Phill. 317.

(c) *Ibid.*

(d) *Bell v. Temiswood*, *supra*.

(e) *Coote*, 8th Ed. 198.

(f) *Budd v. Silver*, 2 Phill. 317.

(g) *Dampier v. Colson*, 2 Phill. 55.

The Court will select for benefit of estate, &c. And where legal objections do not apply the Court will look to the benefit of the estate, and to that of the persons interested in the property (a).

A next of kin, being also legatee, has been preferred to another next of kin who is not such (b).

The personal representative of a next of kin was, in a grant *de bonis non*, preferred to a party entitled in distribution, because there were no assets of the deceased except what might be recovered in a pending suit instituted by such next of kin, the original administrator (c).

Creditors. The union of creditor and next of kin in the same person is rather adverse than favourable to his claim to be preferred (d).

Primogeniture. But the wishes of creditors will have the consideration of the Court when their demands are heavy, and the insolvency of the estate is apprehended (e). And although primogeniture gives no rights, yet if things are precisely equal, being the elder brother would incline the balance (f).

Preference of creditors *inter se*. If creditors contend *inter se* for administration (will), or administration, the Court will prefer one having a judgment debt (g), or a debt of a larger amount than the other creditors can show (h).

The Court has preferred a simple contract creditor, having a large debt against the deceased, to a judgment creditor (i).

Special circumstances. Under sec. 54 S. C. Act, a creditor will be preferred to a residuary legatee, where the insolvency of deceased is clear, but not otherwise (j).

Nominee of creditors. The Court has preferred the nominee of the bulk

(a) *Warwick v. Greville*, *supra*. (g) *Carpenter v. Shelford*, 2 Lee, 503.

(b) *Dobson v. Cracherode*, 2 Lee, 326 (1756). (h) *Kearney v. Whittaker*, 2 Lee, 325, and *ante*, p. 223.

(c) *Carr*, L. R. 1 P. & D. 293. (i) *Ernest v. Eustace*, 1 Deane &

(d) *Webb v. Needham*, 1 Add. 498. Sw., 273.

(e) *Warwick v. Greville*, *ante*. (j) *Hawke v. Wedderburne*, L. R.

(f) *Ibid*. 125. 1 P. & D. 594, & 16 W. R. 712.

of deceased's creditors, or of the principal creditors, to a single creditor (a).

If the selection of the Court is not governed by *Priori potenti*. any of the rules referred to, and where there is difficulty in weighing the merits of different applicants, it will sometimes prefer the first applicant simply as such, he being a responsible person, able and willing to give security (b).

The right of the Court to exercise the discretionary power given by section 54, S. C. Act, is conditioned, in all cases of testacy or intestacy, upon the applicant's proving that it is necessary or convenient, by reason of the insolvency of the deceased's estate, or by reason of any other special circumstances (c). Special circumstances.
Sec. 54 S. C. Act.

The section cannot be made to apply where there are other persons entitled to administration in priority and applying for it; and it does not empower the Court to make a merely arbitrary selection from amongst such persons and others contending for the grant (d). Does not apply, when

In the case of a will further conditions are applicable, for the dispensing power can only be exercised where there is no executor willing or competent to take probate, or where the executor is resident at the time of the death of the deceased out of the Province.

(a) *Smithson*, 15 L. T. 296; 36 L. J. P. & M. 77, & *Re Cameron*, Surr. Ct. Co. York, 1877. (b) *Cordeux v. Trasler*, *supra*.

(c) *Harriet Cooke*, 1 Sw. & Tr. 268; (1859) *F. Keene*, 28 L. J. R. (N. S.) 35. This section of the Act is not to be resorted to on all occasions; it is for the Court to judge of the necessity (D. & B. 476.) In *White* (6 Weekly Reporter, N. S. p. 162) the Court refused to grant administration under the 73rd section Imp. Act to a nephew of the deceased. The intestate's children were living in Georgia *flagrante bello*, and his property was money in the savings bank and consols. Sir Creswell Creswell said, "That section is not applicable to this case. There are no special circumstances to justify me in making the grant under it. The property of the deceased is not perishable."

(d) *Haynes v. Matthews*, 1 Sw. & Tr. 462—3, & Coote, 73.

CHAPTER V.—SECTION I.

LIMITED GRANTS.

1 By virtue of secs. 37 and 54 S. C. Act, and in accordance with S. C. Rules, *ante*, p. 77, as well as under their general jurisdiction, Surrogate Courts will make limited grants.

Referring to the authority of the ordinary to make such grants, the language of the Lord Chancellor in *Davis v. Chanter* (a) is:—"Except where regulated by statute or custom, what is to prevent the holder of the unrestricted authority from delegating the execution of part to another? And so is the established practice." And in *Re Thorpe* (b) it is said that "the Court of Probate in this country always exercised the same jurisdiction in granting limited administrations, as was possessed by the Ecclesiastical Courts in England; and I see no reason to doubt that this was rightfully done, and that the Surrogate Courts have now a like authority."

Grants may be limited (c) (1) in duration; (2) to particular property; or (3) to a particular object or purpose. The nature of the limitation is to be collected from the letters (d).

Grants limited
in duration.

If a testator make an executor from five years after his death, or after the death and marriage of his son, the Court may commit administration to the next of kin in the meantime; and at the expiration of the period for which the administration is limited, probate will be granted to the executor. So, if the executor do not come in, the Court may grant administration limited till he prove the will (e).

(a) 2 Phill. 55 (1848).

(b) 15 Gr. 80. (Per Mowat V.C.)

(c) Coote, 8th ed., 121.

(d) *Ib.*, 121, 155.

(e) D. & B. 434.

When an original will or codicil, or both, have been lost or mislaid since the testator's death, but a true copy has been preserved, the executor may take probate of such copy limited until the original or an authentic copy of it be brought into the registry. But he must produce proof by affidavit, that the original was duly executed; that it was in existence after the testator's death, and has since been lost, and that the copy is a true one (a). Probate of a copy of a lost will.
Limited.

If the executor be appointed during his life, or the executrix be appointed during her widowhood, although absolute powers are given, care is taken to show the limitation of the appointment (b). Probate during life or widowhood.

He must under some circumstances also advertise for the recovery of the lost will or codicil. The form of advertisement is not settled by the registrar.

The directions of the judge, however, are taken as to the newspapers in which the advertisements shall be inserted, and also as to the intervals and number of the insertions.

If the original will or codicil be not recovered by these means an affidavit to that effect is filed.

No consent on the part of the next of kin of the testator is required (c).

Where no copy of the will has been made, but the draft of it can be produced, the case though otherwise the same as that referred to, is differently considered in one respect. In order to entitle the Court to deal with such cases on motion, the consent of all the next of kin must be obtained (d). Probate of draft

If this consent be not given, the draft must be propounded in a suit for that purpose (e).

(a) *Coots*, 122.

(b) *Ib.*, 54.

(c) *Ib.*, 123.

(d) *Barber*, L. R. 1 P. & D. 268; 36 L. J. (N. S.) P. & M. 19; *Butts*, 2 Spinks, 59; *Entichnap* 35; L. T. 427; *Trippleton*, 35, L. T. 909.

(e) *Burle v. Burle*, 36 L. J. (N. S.) P. & M. 125, L. R. 1 P. & D.

When an original will has been lost or destroyed after a testator's death, or has been destroyed in his lifetime by another person without his consent, or by himself without intention, and no draft has been preserved and no copy has been made, with the consent of the next of kin probate may be obtained of its contents, or of its substance and effect, if they can be established by credible evidence, parol evidence being admissible (a).

Of contents or substance.

In all these cases the validity of the execution must be shown, as well as the substance or contents of the will (b).

Contents of lost codicil.

If a codicil has been similarly lost or destroyed, its contents may be proved in the same manner.

The consent of the residuary legatee, under the will, will be required. Should there be no residuary legatee, or should the bequest of the residue have lapsed, the next of kin of the testator must consent.

If the executor be the residuary legatee, his application for probate will be an implied consent.

Affidavit of scripts proved.

Sometimes the Court has granted probate of an affidavit of scripts (filed in the suit), and at other times of a deposition, or an extract from a deposition of a witness, as containing the contents or substance or effect of the lost will or codicil (c), or the declaration in a suit propounding a lost will (d).

Deposition of a witness or extract from it proved.

Probate of a will limited until a lost codicil be found.

If a codicil has been lost since the testator's death, without a copy having been made, or the draft kept, and its contents or substance cannot be shown, the Court will grant probate of the will limited, until the original codicil, or an authentic copy thereof, shall be brought in (e).

(a) *Sugden v. Lord St. Leonards*, ante, and see *Bessey v. Bostwick*, 3 Gr. 279, and *Brown v. Brown*, 8 Ellis & Black. 876.

(b) *H. C. Gardiner*, 1 Sw. & Tr. 110. (c) *Coots*, 124.

(d) *Sugden v. Lord St. Leonards* ante. (e) *Coots*, 124.

So, if the will has been lost since the death of the testator, and it is impracticable to prove its contents or substance, the Court will grant probate of a codicil to that will, containing dispositions independent of, and referring to it (a).

Probate of a
codicil limited
until a lost
will be found.

Where the original will or codicil, or both, were in the possession of a person residing abroad, who refused or neglected to deliver them up, but a copy had been transmitted to the executor in England, probate of such copy was granted to him, on his showing, by affidavit, the manner in which it was transmitted, that a better or more authentic copy did not exist in England, and that it was essential or necessary for the interests of the estate that probate should be forthwith granted, without waiting the arrival of the original, or a better or more authentic copy.

If the copy has been transmitted to a person other than the executor, he will be required to join the executor in the affidavit. The affidavit does not go into the execution of the will or codicil, as in the case of lost or destroyed instruments of that nature (b).

But where a person transmitted to England from abroad copies of his own will and codicil, and afterwards died abroad, and the will and codicil were not forthcoming, the Court held, that as the statement of the deceased, made after the execution of the will and codicil, was not evidence of their execution, the copies were not entitled to probate (c).

So also office copies of Scotch wills which have not received confirmation in a Commissary Court are regarded as unauthentic copies, and similar grants are made in respect of them.

(a) *Greig*, 14 W. R. 349; L. R. 1 P. & D. 72.

(b) *Coots*, p 125.

(c) *J. P. Ripley*, 1 Sw. & Tr. 68.

SURROGATE COURTS.

Under the same conditions as those before stated,
a copy of a copy of a will or codicil may be proved.

Extra-
will)
d.

When the grants before described are made to a
residuary legatee, or any other than the executor,
they take the form of letters of administration (with
will annexed) limited in the same manner (a).

ited
ing widow-
d.

If a residuary legatee be appointed during widow-
hood, the grant is limited so long only as she shall
continue a widow (b).

To next of kin
until original
will found.

The person who applies for letters of administra-
tion is required to swear that the deceased died
without having made a will. It sometimes happens
though no will is forthcoming on the death of the
deceased, that the party cannot in conscience take
the oath, for he may know or have reason to believe
from the deceased's observations, or the information
of others that there was a will in existence subse-
quently to the deceased's death. If no copy of the
will can be produced, and its contents or tenor can-
not be substantiated, he may take administration
limited until the original or a copy be brought in (c).

Durante
absentia.

Where the person entitled is absent from this
Province, administration may be granted for the use
and benefit of, and limited to the return of, such
person (d).

To administer
a particular
estate.

If a testator appoint an executor for the purpose
of administering the estate of another testator, whose
sole or surviving executor he himself was, probate
is granted to him limited for such purpose.
This probate continues the chain of executors
in that particular estate (e).

(b) *Thomas Teed*, 7 No. Ca. 386.

(a) *Coote*, p. 126.

(c) *Coote*, 126.

(d) *Pallison v. Ord*, Bunb. Exch. 116 (1724); *O'Byrne*, 1 Ha
(1828); *Ruddy*, 2 P. & D. 331 (1872); *Re Donovan*, Ct. Prob
1853, and *vide ante* p. 39.

(e) *Coote*, 142-3.

If a testator has appointed a separate executor for the purpose of carrying into effect the trusts and dispositions of a codicil, probate of the codicil, limited to such trusts and dispositions, is granted to him. Limited probate of a codicil.

If a testator appoint an executor of his will generally, and another executor for particular purposes, and the general and limited executors both apply for probate at the same time, the grant is made in the same instrument, and the powers of each are distinguished; that is to say, probate is therein granted of all the estate of the deceased to the general executor, and of that part thereof to the limited executor to which his executorship is expressly confined (a). General and limited probate.

If the general executor apply before the limited executor, the former takes a general probate, and a power is reserved of granting probate, under limitations, to the limited executor (b).

The will of a married woman, made in exercise of a power given to her, must be proved (c). The grant is in practice limited:—"To all such personal estate as the deceased by virtue of the power had a right to appoint or dispose of, and has by her will appointed or disposed of accordingly" (d). Probate of will made in execution of a power form.

A testator domiciled in the State of New York made his will in two parts, "First Part," "Second Part," the one relating to property in Ontario, and the other to property in State of New York. Probate in common form was granted, limited as follows:—"Administration of all and singular the personal estate and effects, rights and credits of the deceased in the Province of Ontario, in any way concerning the first part of his will" (e).

(a) Coote, 143.

(b) *Ibid.*

(c) *Ibid.*

(d) *Ledgard v. Garland*, 3 Curt. 286; *De Pradel*, L. R. 1 P. & D. 455.

(e) *Re Jesse Ketchum, dec.*, Surr. Ct. Co. York, Nov. 1867.

Limited probate.

The Court, under these circumstances, can only grant a limited probate (*a*).

A limited grant has been made where the will of a *feme covert* has been made in pursuance only of the consent of the husband (*b*), the husband surviving and consenting to probate being granted (*c*).

Limited probate of will made during coverture.

A limited probate (as in the case of a *feme covert*) was granted where the testatrix made her will during coverture, and afterwards became a widow and died without republishing it; the goods acquired by the testatrix after the husband's death, and during her widowhood, not passing under such will (*d*).

Where a *feme executrix* has exercised her right at common law of appointing by her will, an executor of the goods held by herself *en autre droit*, as such executrix, probate of such will is granted limited accordingly (*e*).

Form of limitation.

In another case the probate was *inter alia*, "limited to the power which the deceased had of appointing an executor of and concerning the personal estate and effects of David Birkett, as surviving executor named in his will, and which power she has duly exercised, &c." (*f*).

This is a separate probate, where there is no settled property. Otherwise the two grants are united (*g*).

Limited to particular property under power of attorney. Limited administration with will.

Where the power given by an executor to his attorney to prove a will for him is special, and limited to specific property, the grant of administration (with

(*a*) *Scammell v. Wilkinson*, 2 East, 558; *Stephens v. Bagwell*, 15 Ves. 158.

(*b*) *Maas v. Sheffield*, 4 No. Ca. 35; 1 Rob. 364.

(*c*) *Coote*, 145.

(*d*) *Noble v. Phelps*, L. R. 2 P. & D. 281; *Noble v. Willcock*, 7 L. R. Eng. & Scotch App. 589; *Scammell v. Wilkinson*, *supra*.

(*e*) *Coote*, 146.

(*f*) *Birkett v. Vandercomm*, 3 Hagg. 750; *Scammell v. Wilkinson*, *supra*.

(*g*) *Coote*, 147.

the will annexed) made to the attorney is limited accordingly (a).

Where a bastard, leaving no widow or children, makes a will disposing of part only of his personal estate, the legatees under such will are entitled to administration with the will annexed, limited to the property so disposed of; the crown being left to take administration *cæterorum* (b).

Where a testator has bequeathed personal estate ^{Trust property.} vested in him as trustee, the Court will grant administration (will) to the legatee in trust, on the renunciation of the executor and residuary legatee (c).

If a person has died, leaving personal property, of which he was sole or surviving trustee, administration may be granted limited to that property (d).

The Court follows the deed or will which created the trust in all points. The original deed must be produced, and (by the E. C. P. practice) lodged in the registry (e).

This grant is limited to the right, title and interests of the deceased in the property in question (f). ^{Nature of limitation.}

If a trust is still subsisting on the death of the surviving trustee, and new trustees have been duly ^{Grant to new trustees, or, &c.} appointed, administration will be granted of the effects of the former to the new trustees or to their nominee; or, if the new trustees have not yet been appointed, to the nominee of the person or persons who have the right to appoint the new trustees (g).

If the trusts were legally at an end at or before ^{To cestui que trust.} the death of the surviving trustee, but the trust estate was not transferred by the latter in his life time, the Court will on his death grant administra-

(a) Coote, 148.

(d) Coote, 150.

(b) *Rhoades*, 1 L. R. P. & D. 119.

(e) *F. Keene*, 1 Sw. & Tr. 267.

(c) *Prothero*, 23 W. R. 212, & 13 L. R. 210.

(f) Coote, 151.

(g) *Ib.*, 150.

tion of his effects to the *cestui que trust*, or if there be more than one such to one of the *cestuis que trust* with the consent of the others, or to a nominee of the sole, or all the *cestuis que trust* (a).

If only some of the parties elect, the grant will be made to their nominee to the extent of their shares (a), and the dissentient party or parties are at liberty afterwards to apply for a grant limited to the remaining shares of the fund (b).

Limited to receipt of dividends.

If the party applying be only entitled to a life interest in the fund, the grant will be limited to the receipt of the dividends, or other produce of the fund during the annuitant's life.

Persons entitled to general grant to renounce.

Those persons who are entitled to the general representation, though they have no interest in the property in question, must renounce or consent, or be cited (c).

This is in accordance with a rule of the English Court of Probate (d).

The will not annexed.

Whether the deceased has died testate or intestate, administration is granted without the will being annexed, as the object of the representation in no way interferes with the administration of the deceased's own estate (e).

Letters *ad colligendum*.

The Court is not bound to wait for the application of persons entitled to the estate (*ex testamento* or *ab intestato*), but when it may be endangered by delay in administering, the Court may grant letters *ad colligendum* for the preservation of precarious or perishable property, without regard to the interest of the party applying (f).

(a) *Pegg v. Chamberlain*, 1 Sw. & Tr. 528, and Coote, 151.

(b) Coote, 151.

(c) *Vide* S. C. rule 12, *ante*.

(d) *Barker*, 1 Curt. 592, F. Keene, 28 L. J. R. (N. S.) 25; *Pegg v. Chamberlain*, *supra*.

(e) Coote, 151.

(f) *Walker v. Wollaston*, 2 P. Wms. 584. *In the goods of Roche Hayes, dec.*, Surr. Ct. H. D. Nov. 1849, and *In the goods of David Jardine*, Ct. Prob. U. C., 1849, and *Hugh Lennan*, *Ibid.* 1858.

This form of administration will be made to persons who are entitled to a full grant when it is shewn that, owing to the necessities of the estate, they cannot wait until the usual forms of the Court shall have been complied with (*a*), or to entire strangers, whom mere chance has brought into connection with the affair (*b*).

In *Mary Radnall* (*c*), the Court granted administration, "limited to the collection of all the personal property of the deceased; and giving discharges for all the debts which might be due to her estate on payment of the same; and doing what further might be necessary for the preservation of the property aforesaid; and to the safe keeping of the same, to abide the directions of the Court." Administration *ad colligenda bona*.
Form.

Upon the same principle, administration has been granted limited to the sale of a ship, and to the protection of the cargo, and other matters relating thereto (*d*). Sale of ship.

The Court granted administration in the case of *Charles Clarkington* (*e*), "limited to the collection of the personal estate of the deceased, with a power to the administrator to give discharges for his debts on payment of the same, and to renew the lease." Form of limitation. But the Court refused to give power to dispose of the premises, and of the good will of the business. Limitation.

In another case given by Mr. Coote, the administration was limited "to collect and get in the outstanding debts of the deceased and prosecute actions for the recovery thereof, and to invest the proceeds in the purchase of exchequer bills" &c. (*f*). Limitation investment.

And where a foreigner died in London away from his relatives, possessed of certain bills of exchange upon English merchants, the Court granted adminis-

(*a*) 10 W. R. 124; 2 Sw. and Tr. 382.

(*b*) *Gudolle*, 3 Sw. and Tr. 22; *Wychoff*, 15 Law Mag. 71.

(*c*) *Ante*. (*d*) *Coote*, 157. (*e*) 2 Sw. & Tr. 382. (*f*) *Coote*, 157.

tration to an English friend or acquaintance of the deceased (who had procured the bills to be accepted, and had paid certain necessary expenses of the deceased), "limited to the sums due and to become due on the bills of exchange; and, after the administrator should have reimbursed himself the money which he had expended on behalf of the deceased, and also of the expense of the application to the Court, to invest the balance in his own name in government securities, and to keep it so invested until a general representation should be effected to the deceased" (a).

Limitation to reimburse, &c. Administration was granted to a nominee of the guardian of the deceased's only child, "limited for the purpose only of collecting and getting in all outstanding moneys, debts, or accounts, receiving all dividends due, or to accrue due, upon any sum in the public funds of Great Britain, and all interest or dividends that might be declared due upon any other security or securities in Great Britain; and also to present when due, any bill or bills of exchange, and to receive the amount thereof; and the money when so collected and got in as aforesaid, to invest in the public funds of Great Britain or other good and sufficient security or securities in England, bearing interest, until the original will or an authentic copy should be brought into and left in the registry of the Court, in case it should appear that the deceased made any will, or until it should be ascertained that the deceased died intestate (b).

Limitation. Where the estate was timber and certain debts, the court directed that after payment of the charges upon the timber and servants' wages, the balance

(a) *Don Miguel*, 3 Sw. & Tr. 22.

(b) *Howell v. Metcalfe*, 2 Add. 350.

should be paid into the registry, to remain until a general grant should issue (a).

And in another case the Court granted administration, limited to dispose of the good will of a school, for the purchase of which an offer had been made, the administrator to pay into the registry the purchase money, less the expenses of sale and the costs of the letters of administration (b).

A creditor insured the life of his debtor, but the Life policy having by mistake been made payable to the representatives of the deceased, the Court granted administration to the creditor, limited to the policy (c).

SECTION II.

Grants for the Use and Benefit "Jus Habentium."

Where one or more persons who have a right to administration, or a beneficial interest in the estate of the testator or intestate, are precluded from personally acting by residence out of the jurisdiction of the Court or by their own minority, or by their lunacy, or imbecility, the Court will make a grant to another person for the use and benefit *habentium jus seu interesse*, but will limit it in duration to such a period as the circumstances of the case demand (d).

By S. C. Rule 15 *ante*, "grants of administration may be made to the guardians of infants and minors, Grants to guardians of infants. for the use and benefit of such infants and minors Limitation. during their minority; and elections by minors, of their next of kin, or next friend, as the case may be,

(a) *Stewart* 38 L. J. (N.S.) P. and M. 39, 1 L. R. P. & D. 727.

(b) *Schwerdtfeger*, 45 L. J. (P. D. & A.) 46.

(c) *Patteson v. Hunter*, 30 L. J. P. & M. 272.

(d) *vide* S. C. Act, ss. 37, 54; and see P. Wms. 589.

to such guardianship shall be required." (See Form of Election *ante*, p. 115.)

This is substantially the same as E. C. P. Rule, prior to 5 Dec., 1859, which was as follows :—

"Grants of administration will continue to be made as heretofore to the guardians of minors and infants for the use and benefit of such minors and infants during their minority; and elections by minors of their next of kin, or next friend as the case may be, to such guardianship, will continue to be required; but proxies, accepting such guardianship, will in future be dispensed with" (a).

The E. C. P. rules, of the time referred to, contained the following further provisions :—

"In all cases where grants of administration are made for the use and benefit of minors, the administrators are required to exhibit a declaration on oath of the personal estate and effects of the deceased, except where the effects are sworn under twenty pounds, or where the administrators are the guardians appointed by the Court of Chancery, or are the testamentary guardians of the minors; and in all cases of persons cited, but not personally, and not appearing, the administrators are required to exhibit a similar declaration and the sureties are required to justify" (b).

The E. C. P. Rules of 1862 (*vide Coote*, 369) contained further provisions on this subject, not in force in this Province, *e. gr.* that—

"Where the infant is under seven years (being incompetent to elect a guardian) and not having a testamentary guardian or a guardian appointed by the High Court of Chancery, the Court would assign one for the purpose of taking administration for the use and benefit of such infant."

S. C. Rule 15, above referred to, does not expressly provide for guardians being assigned or nominated by the Court to take administration for infants under seven years, as do the E. C. P. Rules of 1862 (c).

(a) Horsey 240, *vide ante*, p. 207.

(b) Horsey, 239.

(c) Coote, 369.

But the practice of Surrogate Courts in such cases (including the case of an infant sole executor) seems to depend upon the ancient practice of the Prerogative Court as well as that of the former Court of Probate, U. C.

To guardian
of infants.

If a testator make one an executor who is in his minority, administration is granted to some other to the use of said executor *durante minore etate* (a).

In *Ewing* (b) the Court nominated a guardian to take administration for the use and benefit of the infant. And Sir George Lee granted administration *cum testamento* to the next of kin during the minority of a sole executor (c).

A guardian appointed by the Prerogative Court was preferred to be confirmed in the administration to the guardian appointed by the Court of Chancery (d).

The former court of Probate (U.C.) made such grants (e).

After the Act of 8 Geo. IV. (*vide ante* p. 65) respecting the appointment of guardians of infants, the judges of that Court appear to have held that a guardian appointed under that Act was entitled, *qua* guardian, to a grant of administration *durante minoritate*.

In *the goods of Leon Jones, dec.*, upon petition of the paternal uncle of the infant orphan children, setting forth that he had obtained such letters of guardianship (*viz.*, under 8 Geo. IV.), letters of administration of the estate of their mother were com-

(a) *Swinb. Pt. 5, a. 5.*

(b) 1 *Hagg.* 381, see also *Rich v. Chamberlayne*, 1 *Lee*, 134.

(c) *Appleby v. Appleby*, 1 *Lee*, 135. And see *Faukenner v. Jordan*, 2 *Lee*, 327.

(d) *Brotherton v. Hellier*, 2 *Lee*, 131.

(e) *Re Edward Walker, dec.*, Ct. Prob. U. C. July, 1824; *Re John Burns*, *Ibid.* 1824.

mitted to him "during the minority of the infant children" (a).

It has been held that a guardian appointed by the father under 12 Car. II., c. 24, takes the place of all other guardians; "the statute put him in *loco parentis*" (b).

To the guardian appointed by the father.

By the E. C. P. practice, according to Mr. Coote (p. 129), the person entitled in preference to all others was the guardian appointed by will or deed of the father, under 12 Car. II., c. 24 (c).

It would appear that a guardian appointed under 8 Geo. IV. by a Surrogate Court, would be next entitled. (*ante*, p. 255).

To the guardian appointed by the Court of Chancery.

Next in order to the guardian appointed under the Statute of Charles II., was the guardian of the estate (not the person) of a minor appointed by the Court of Chancery (d).

In the first case a reference to the father's will, as proved, is required. In the other case, an office copy of the order or decree appointing the guardian is filed in evidence of his title (e).

No inventory required from these guardians.

Neither of these guardians, by the E. C. P. practice, is required by the Court to file an inventory of the deceased's effects for the protection of their ward, the trustworthiness of the one being vouched by the father, and the other being accountable to the Court which has appointed him.

The court will not grant to one testamentary guardian without the consent of the other.

The Court will not grant to one, out of many testamentary guardians, without the consent of the others, on account of their joint tenancy (f).

(a) *Re Leon Jones*, dec., Ct. Prob. U.C. temp. Grant Powell, Official Principal, 1832; & *James Henderson*, dec., Ct. Prob. U. C. temp. Hepburn, Official Principal.

(b) 2 P. Wms. 125.

(c) *Louisa Morris* 5 L. J. R. (N.S.), 768, and 2 Sw. & Tr. 362.

(d) *W. Jones* 28 L. J. R. (N. S.) 80.

(e) Coote, 129.

(f) *Ib.*, 130.

The court will grant to a guardian appointed by a foreign court, competent for that purpose; but such guardian must prove his appointment by a copy of the decree by which he has been nominated, authenticated by the seal of that court (a). To a guardian appointed by a foreign court.

If there be none such, the court will itself appoint a curator or guardian out of the next of kin of the minor for the purpose of taking the grant (b).

The next of kin for this purpose are calculated in the same manner as for purposes of distribution (c). To guardian of minor.

If the executor or residuary legatee be above the age of seven years, but under the age of twenty-one, he has the privilege of electing any one of his next of kin to be his curator or guardian.

This is done by the minor in an instrument signed by him in the presence of an attesting witness (d).

Where there are several minors all must join in the election of a guardian. If there be a dissentient, he must renounce administration by his guardian (elected by him *pro ed vice*), or he must be cited. But this rule is occasionally relaxed (e). All the minors must elect, or dissentient must renounce.

When one out of a numerous family is prevented by residence or absence abroad, from joining, the court on affidavit, will pass him or her over, and will give administration to the guardian appointed by the other minors, for the use and benefit of all of them. Minor passed over.

If the minor is cited (viz., to accept or refuse the proposed grant or show cause why it should not be made to the guardian of the other minors), and does not appear to the citation, the practice is to grant to the guardian of the others, for the use and benefit of all (f).

(a) But see *Brotherton v. Hellier*, 2 Lee, 135.

(b) *Bick v. Chamberlayne*, *supra*, and *Swing*, *infra*.

(c) *Coot*, 130.

(d) *ante*, p. 115.

(e) *Coot*, 132.

(f) See *Spriggs v. Banks*, 4 No., Ca. 103.

Minors and infants next of kin, preference to.

The minors and infants next of kin have the preferential right of assuming their guardianship; and minors are under a corresponding obligation to elect their next of kin for such purposes in preference to all others. It is, however, in the choice of the next of kin to assume such guardianship or not. They may renounce it in the case either of infants or minors. The court granted administration to the stepmother of the executor (a minor) on his two sisters (his next of kin) renouncing, the one in due form, and the other without the sanction of her husband, and it being shown that his elder brother (his other next of kin) had not been heard of for many years (a).

A stranger or distant relative may then be elected.

If the next of kin renounce the guardianship, and the minors elect a stranger in blood or a distant relative, the party elected will be entitled to administration. But the court is not concluded by the choice of the minors; it has a discretionary power to refuse to grant administration to the person elected by them (b).

The court not concluded by the minor's choice.

The court must have grounds for such a refusal; but if a minor be nearly of full age, it is probable that the court would hold itself to be concluded by his election.

Minor may refuse to elect his next of kin on ground shown.

But if a ground of objection exist against the minor's next of kin, the minor is not, in that case, bound to elect him; and the court will, if the objection be sound, pass him over and appoint a stranger in blood, or a more remote kinsman, to be guardian (c).

A foreign domicile, or protracted absence from this country, would justify the minor in refusing to

(a) *Widger*, 3 Curt. 56.

(b) *Fawkenor v. Jordan*, 2 Lee. 330. *West v. Wilby*, 3 Phill. 379.

(c) *Hay*, L. R. 1 P. & D. 52. *Stephenson*, L. R. 1 P. & D. 287. *Weir*, 2 Sw. & Tr. 451. *Ewing*, 1 Hagg. 381.

elect, and the court in passing over the next of kin without citing him (a).

If the minor or infant be a bastard, or have no known relations, notice must be given to the Attorney-General, and if he takes no objection the court will confirm the minor's choice of any person whom he thinks fit to choose for his guardian, and will grant administration accordingly. Minor a bastard or without relations, &c.

The number of guardians must not exceed three. They need not always be persons in an equal degree, for the court will occasionally join a stranger in blood with a next of kin, in which case, besides the election by the minor, there must be an affidavit of the guardians showing a satisfactory reason for the grant. Stranger joined with next of kin.

A more distant relative and a stranger will be joined on the consent and renunciation of the next of kin (b). Distant relative and stranger joined.

The grant ceases upon the minor attaining his majority. And a grant for the use and benefit of two or more minors and infants is made until one of them shall attain twenty-one years; and should one of them die before that age, it ceases when the eldest survivor attains majority (c). Limitation.

Where the *jus habens* is incapacitated from the transaction of business by reason of his lunacy, imbecility or unsoundness of mind, administration during lunacy will be granted for his use and benefit in analogy with the case of minority (d). For the use and benefit of a lunatic *jus habens*.

In the first place, if a sole executor be a lunatic, administration (with the will annexed) will be granted to the committee of his estate, for his use and benefit, until he shall become of sound mind (e). To committee of executor.

(a) *Hagger*, 3 Sw. & Tr. 65. *Burchmore*, 3 L. R. P. & D. 139.

(b) *Coots*, 135.

(c) *Shep. Touchstone*, 490; & *Coots*, 133.

(d) *Southmead*, *supra*, and *Coots*, 135.

(e) *Id.*

If there be two committees, both must take or one must renounce.

The production of the commission proved the committee's title, and also the lunacy of his ward (a).

To Scotch
curator or for-
eign commit-
tee.

Administration will be granted similarly to a Scotch curator, or to a committee appointed by a foreign court.

To the next of
kin of the ex-
ecutor.

If the executor have no committee, a grant will be made to his next of kin for his use and benefit.

Affidavit as to
the lunacy.

When no commission has been taken out, the Surrogate Court will satisfy itself as to the lunacy, by calling for a joint affidavit of the surgeon or physician keeping or regularly visiting the asylum where the patient is confined, and of the keeper or nurse.

To the com-
mittee or the
next of kin of
a residuary
legatee.

If the residuary legatee be a lunatic (there being no executor) administration with the will annexed will be granted to a committee of his estate, if he have one, or to his next of kin, for his use and benefit, &c.

The next of kin files an inventory and affidavit of value, and gives justifying security.

In case of in-
testacy.

In the case of an intestacy, administration will be granted to the committee, if there be one, or if there be none, to the next of kin of the lunatic, next of kin or husband of the intestate (as the case may be), under precisely the same regulations and conditions as apply to the other cases (a).

Grant under
sec. 54 S. C.
Act.

Where a necessity can be shown the Court will make a grant under the 54th sec. S. C. Act to an uninterested person for the use and benefit of the next of kin until the latter shall apply (b).

Under the same section a grant will be made for the use of a lunatic, to a person of no kindred to the latter (c).

(a) Coote, 136.

(b) Cholwill, L. R. 1 P. & D. 192.

(c) Mary Burrell, Sw. & Tr. 65, and Grace Hastings, L. R. 4, P. D. 73.

In like manner, where the intestate's widow is a lunatic, administration will be granted to the committee of her estate, if there be one, if not to her next of kin for her use and benefit (a). To the committee or next of kin of widow.

Where, however, neither her committee nor her next of kin applied for such a grant, the court has passed over the widow and granted to the intestate's next of kin absolutely (b). To next of kin.

If the next of kin in such a case renounce and consent, the Court will grant to a creditor for the use and benefit of the widow, &c. (c). To a creditor for the use of widow.

If the person entitled reside out of Ontario (d), administration, or administration with the will annexed, may be granted to his attorney, acting under a power of attorney. If *jus habens* out of jurisdiction.

This is in analogy to the practice of the English Court of Probate (e).

It was also the practice of the former Court of Probate U. C. (f).

If the executor or executors reside out of the jurisdiction of the Court, he or they may appoint an attorney to prove their testator's will, in their name and on their behalf (e). To attorney of executors.

Where the estate was trust property only, the Court allowed the attorney of a person residing in England to take administration (g).

And it would seem that the attorney need not reside in Ontario, but may obtain a grant provided his sureties reside here (h).

(a) *Alford v. Alford*, 1 Deane, [324.

(b) *J. Williams*, 3 Hagg. 217.

(c) *T. N. Penny*, 1 Rob. 426.

(d) *S. C. Act*, sec. 37 *ante*.

(e) *Horsley's Prob. Prac.*, 1858, pp. 47, 244; and *O'Byrne*, 1 Hagg. 316; and see *Bullar*, 39 L. J. R. (N. S.) P. & M. 26, and *Coots*, 127.

(f) *In the goods of W. Paris Vincent*, dec. Ct. Prob. U. C. Feb. 1849.

(g) *Bullar*, *supra*.

(h) *Joseph Leeson*, 1 Sw. & Tr. 463, but see *T. Reed*, 3 Sw. & Tr. 441, and *W. Ballingall*, *ibid*.

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But if the principal and attorney reside in the same place out of the jurisdiction, the Court will not make a grant to the attorney (a).

ne coverte. A power of attorney executed by a *feme coverte*, must be executed by the husband also. But where she is a legatee for her separate use, and the husband refuses to join in the power, the Court has accepted it without his joinder (b).

The power should be under seal. But the Court has accepted informal documents (c).

To attorney
of one executor
for use of all.

If the attorney be appointed by one only, of two or more executors, a grant will be made to such attorney for the use and benefit of both or all the executors, until the one who singly appointed the attorney, or the other executor or executors, shall apply (d).

Form.

Letters of administration with the will annexed, of all and singular the personal estate and effects of the deceased, are granted to the attorney 'for the use and benefit of' his constituent, and 'until he shall duly apply for and obtain probate of the will to be granted to him' (e).

The grant is virtually for the use and benefit of all persons beneficially interested in the estate (f).

The power of attorney is filed, and the grant follows the terms of the power (g).

The grant determines by the executor returning to this country and taking probate.

If the letter of attorney contain a power of substi

(a) Coote, 128.

(b) Warren, L. R. 1, P. & D. 539.

(c) Elderton, 4 Hagg. 210. Ormond, 1 Hagg. 146. and Boyl Sw. & Tr. 427.

(d) Coote, 128. (e) Cassidy, 4 Hagg. 361; and see 10 Sim. /

(f) Chambers v. Bicknell, 2 Hare, 536. As to the powers of an administrator, see Webb v. Kirby, 25 L. J. (N. S. Equity) 8

(g) G. Goldsborough, 1 Sw. & Tr. 297.

tution, and the attorney exercise it, the substitute may take the grant (a).

The attorney of one of many residuary legatees may take administration (will) without notice to the other residuary legatees.

Grant to the attorney of one residuary legatee, *e pluribus*.

The attorney of one of many next of kin may take administration in like manner, without notice to the other next of kin.

Grant to the attorney of one next of kin, *e pluribus*.

The limitation in the two last-mentioned grants is, *mutatis mutandis*, the same as in the one which was first mentioned, and the grants will determine in like manner (b).

SECTION III.

Administration pendente lite.

The 51st sec. Surrogate Court Act enables the Court to grant administration *pendente lite* in the cases there mentioned (c).

In *Verot v. Duprez* (d) it was held that the intention of the Legislature by sec. 78, Court of Probate Act, was to extend the powers of an administrator *pendente lite* appointed by that Court, and that such administrator having the same power of protecting the property as a receiver, the Court would refuse to appoint a receiver; and also that as the Court of Probate could appoint an administrator *pendente lite*, who had full power to deal with the estate except for the purpose of distribution, and as the appointment of a receiver could afford no greater protection, such appointment of a receiver should be refused.

(a) *Pallison v. Ord*, Bunbury's Exch. Rep. 166.

(b) Coote, p. 129.

(c) And see *Re Beckwith*, *ante*, p. 34.

(d) L. R. 6 Eq. 329.

SURROGATE COURTS.

pendente

It was from an early date the practice of the Prerogative Court to appoint administrators *pendente lite* (a), but that Court would refuse to make such a grant merely to take property out of the hands of a litigant party in actual possession of it. It was required to be shown that the property was in jeopardy, and that the party sought to be dispossessed was irresponsible and refused or neglected to furnish adequate and reasonable security (b).

general rule.

This practice was followed for some time in the Court of Probate in England, but in the case of *Bellew v. Bellew* (c) the practice in this particular was assimilated to the practice of the Court of Chancery in appointing a receiver, and the general rule was laid down, that wherever there is a suit pending, an administrator *pendente lite* will, on application, be appointed irrespective of the condition of the estate, or the person who has actual possession of it.

But where the deceased's property was invested in a business, which he had carried on in partnership with his brother, who was continuing it, the Court declined to appoint an administrator *pendente lite*, the brother who was a party to the suit opposing, as there was no sufficient evidence that he was wasting the estate (d).

Contested suit.

In a contested suit, which was likely to be protracted, the Court, on the application of a creditor who was not a party to the suit, appointed a person who had been appointed receiver of the estate in the Court of Chancery, an administrator *pendente lite*, in order to enable a creditor to obtain payment of his debt (e).

(a) *Maskeline v. Harrison*, 2 Lee, 258.
(b) *Young v. Brown*, 1 Hagg. 54; *Goderich v. Jones*, 2 Curt.

Northey v. Cock, 1 Add. 329.

(c) 4 Sw. & Tr. 58 (1818).
(d) *Horrell v. Wills*, L. R. 1 P. & D. 103 (1866).

(e) *Tichborne v. Tichborne*, 20 L. T. 820.

Where a suit was pending to try the validity of a codicil only, which did not affect the appointment contained in the will of the executor, the Court rejected, with costs, a motion for the appointment of an administrator *pendente lite*, on the ground that the executor was clothed with power, and was the proper person to administer the estate (*a*).

Such an administrator is merely an officer of the Court, his administration is to be under the direction of the Court (*b*), and he holds the property only until the suit terminates. He is then bound, and the Court will compel him to pay all that he has received to the person pronounced by the Court to be entitled (*c*). The Court will not interfere with his proceedings when he is acting under the direction of the Court of Chancery in reference to the sale or management of the property (*d*).

Administrator
pendente lite
acts under the
direction of
the Court.

In *Charleton v. Hindmarsh* (*e*), the Court directed that he should not discharge claims on the deceased's estate until they had passed before the registrar.

The Court may require securities from administrators *pendente lite* (S. C. R. 30). Security to the amount of one year's income of the property was required (*e*).

Administration *pendente lite* ceases on the determination of the suit, and the executor will take probate of the will, or the next of kin will take administration as the case may be (*f*).

In the form of oath taken by the administrator, the latter (in accordance with the 51st section of the Act) swears, that he will administer the deceased's estate, "save as to the residue thereof, under the direction of the Court." Peculiarity in the oath.

(*a*) *Mortimer v. Paull*, L. R. 2 P. & D. 85.

(*b*) *Stanley v. Bernes*, 1 Hagg. 221, and *Dame Susannah Graves*, 1 Hagg. 313.

(*c*) *Dame Susannah Graves*, *supra*.

(*d*) *Tichborne v. Tichborne*, 2 L. R. A & E. 42.

(*e*) 1 Sw. & Tr. 519.

(*f*) *Coots*, 142.

ection and control of the Court." And before taking any step to administer his deceased's estate, he should apply to the Court for leave (a).

Limited grant
pendente lite.

There is nothing in the Act to preclude the Court from granting *pendente lite* administration of the effects of a deceased, limited to his interest in property as a trustee (a).

Amenable to
suit in Chan-
cery.

An administrator *pendente lite* is amenable in a suit in equity, and liable to account to his successors in the representation (*Per Moss, C. J., in Beatty v. Haldan*) (b).

SECTION IV.

Administration ad litem.

Limited to a
suit in Chan-
cery.

When it is necessary that the representative of a deceased person be made a party to a pending suit in Chancery, but the executors or next of kin of such person will not qualify themselves as his representatives, administration may be granted to the nominee of a party in such suit, limited "to attend, supply, substantiate and confirm the proceedings already had, or that shall or may be had in the said suit in the Court of Chancery, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching or concerning the matters at issue in the said cause or suit, and until a final decree shall be had and made therein, and the said decree carried into execution, and the execution thereof fully completed" (c).

The Form.

(a) Coote, 141, and *Charleton v. Hindmarsh*, *supra*.

(b) 4 App. Rep. 239.

(c) See Coote, 152; and see Taylor's Chy. Orders, G. O. 56, and *note*, as to cases in which the Court of Chancery may appoint some person to represent the estate of a deceased for purposes of suit, where there is no legal personal representative. See also R. S. O., c. 49, s. 9, and *Dey v. Dey*, 2 Gr. 149.

The grant of letters of administration *ad litem* makes the grantee complete representative of the estate to the extent of the authority which the letters purport to confer (a).

Administration is also granted to the nominee of a plaintiff, who is about to commence proceedings. ^{To commence proceedings.} And the grant will be made whether the party proceeds by bill or petition (b).

Or for putting in an answer (2 Add. 351 n).

Under no circumstances can the grant be general (c).

Under this form of administration the grantee has only authority to carry on the Chancery suit, and has no right to receive the fruits of it (d).

But if it be required the Court will allow a further limitation, viz., to receive any sum which shall be pronounced by the final order or decree to be due and payable, with interest (d).

Administration was granted to the agent of a foreign prince, as proved by affidavit, to sue in Chancery for a debt due in this country to the principal; but not to receive the debt unless a power of attorney to that effect should be produced. Rothschild, the agent in England of the Elector of Hesse in 1827, obtained on an affidavit of instructions, a grant of administration limited to substantiate proceedings in Chancery for the recovery of a debt due from the estate of the then late Duke of York. To receive the debt a fuller authority was required, seemingly a power of attorney (e). ^{To agent of foreigner.}

Upon its production the grant was revoked, and a new administration limited to further proceedings

(a) *Davis v. Chanter*, 2 Phillips 545.

(b) Coote, 152.

(c) *Chanter*, 1 Rob. 274; *Davis v. Chanter*, 2 Phillips 550; *Maclean v. Dawson*, 1 Sw. & Tr. 425.

(d) *Dodgson*, 1 Sw. & Tr. 280, and 28 L. J. (N.S.) P. & M., 116.

(e) *The Elector of Hesse*, 1 Hagg. 93 (1827).

in Chancery, and to the recovery of the debt was granted (a).

SECTION V.

Grants, "Save and Except."

Grants, save
and except.

Probate of a will, or letters of administration, or administration with a will annexed, will be granted, save and except any particular fund, whenever the nature of the case and the law require such exception to be made.

Probate, save
and except.

If a testator appoint an executor for a special purpose, or a specific fund only, and appoint an executor for all other purposes, the latter may take probate save and except that purpose or fund.

Administra-
tion (will) save
and except.

Or, if there be no such other executor, the residuary legatee may take administration (with the will annexed) of all and singular the effects of the deceased, under the same exception.

Partial
intestacy.

When a testator has made his will for a particular or limited purpose only,—*e. g.*, the administration of a fund vested in himself as trustee, the administration of an estate vested in himself as executor, or the administration of his own property in some particular district or country,—and has died intestate as regards all other property of his own or vested in him, his next of kin (without waiting for the executor to take the limited probate which he is entitled to under such circumstances) may take administration of all and singular the deceased's effects, save and except what the testator has himself excepted.

To husband
of testatrix.

In like manner the husband of a testatrix, who has made her will under a power, may take administration, save and except what she had a power to

(a) *Ibid.*

dispose of by her will, and has disposed of by it, before the executor proves the will.

The grants of probate and administration, save and except, are usually made in the first instance, without the parties waiting for the limited grants being taken. When the latter have been made, it is more usual that the probate or administration be *cæterorum*; but there is no reason, though a limited grant has been made, that the following grant should not be "save and except" (a).

SECTION VI.

Grants "Cæterorum."

The probate or administration following upon a ^{Grants} limited grant is *cæterorum*; *i. e.*—to administer that ^{*cæterorum.*} part of an estate to which no grant has hitherto applied (b). Except that it follows, instead of preceding such a grant, it is made for the same purposes, and under the same conditions, as the grant "save and except."

If a testator has appointed an executor for a ^{Probate} special purpose, or a specific fund, together with ^{*cæterorum.*} another executor for all other purposes and effects, and the first-mentioned executor has taken his limited probate, the other may take probate of the rest of the testator's effects.

If a limited grant has been previously made (*viz.*, ^{Administra-} on the renunciation of the executor), the residuary ^{tion (will)} legatee may at any time come in and take adminis- ^{*cæterorum.*} tration (with the will annexed) of the rest of the deceased's effects.

(a) Coote, 4th ed. 126, and D. & B. 475.

(b) Coote, 161; *Boxley v. Stubington*, 2 Lee, 542, (1758).

Administra-
tion *ceterorum*
to husband.

If the executor of a married woman's will has taken a limited probate, the husband or his representative may take administration of the rest of her effects.

To next of kin
after limited
probate.

Where a limited probate had been taken of a will made during coverture, but not republished during the widowhood of the testatrix, the next of kin took the administration of the rest of the effects of the testatrix (a).

If the deceased has made a will and appointed an executor for a special purpose, or for a specific fund or property only, and has died intestate in all other respects, his next of kin, after the executor has taken a limited probate of the will, are entitled to administration of the rest of the deceased's effects.

After limited
administra-
tion.

If a limited administration has been granted of the effects of any intestate, his next of kin are entitled to take administration of the rest of the deceased's estate (b).

CHAPTER VI.

GRANTS MADE UNDER SEC. 54, S. C. ACT (SPECIAL CIRCUMSTANCES).

Special power
under Sec. 54.

Reference has been incidentally made to the special power and discretion conferred upon Surrogate Courts by section 54 of the Act (c). As, however, it is of frequent occurrence that the exercise of this power is invoked, it may be proper to mention particular cases in which grants have been made

(a) *Noble v. Phelps*, *supra*.

(b) *Coote*, 162 ; and see *Rhoades*, *supra*.

(c) *Ante*, p. 47.

under the section ; referring also to cases in which they have been refused.

Where upon the state of facts mentioned in the first part of the section, it appears to the Court to be necessary or convenient (a) by reason of the insolvency of the estate, or other special circumstances, it may appoint some person to be administrator of the personal estate, or of any part of it,—other than the person who, but for this enactment, would have been entitled to the grant (1).

A general principle as to the exercise of this special power was laid down by Sir J. P. Wilde, in *Findlay (b)*, as follows :—

“ These powers are exercised with some reluctance, but the true function of the Court is to facilitate the collection and distribution of the estates of deceased persons, and not by any technical rules to impede that distribution.”

A grant of administration, for the use and benefit of the next of kin was made under the special power referred to (sec. 73, Eng. Prob. Act) where the estate of the intestate was perishable and the next of kin were abroad (c).

Where the person entitled, the son and only next of kin of the intestate, was in New Zealand, the

(1) The Court exercises the power conferred by this section in case of the insolvency of the estate of the deceased (c); insolvency being specified in the section, though “ only given as an example ” of the special circumstances (d), by reason of which it may become apparent to the Court that it is necessary or convenient to exercise the extraordinary power given by the Statute.

(a) *Cooke, supra*, p. 241.

(b) 3 Sw. & Tr. 265 (1863).

(c) *Elisha Peck*, 1 Sw. & Tr. 141, and *Farrands*, L. R., 1 P. & D. 439.

(d) *Farrands, supra*.

(e) *Young*, 36 L. J., P. & M. 80 (goodwill of business) ; and see *Chotwill*, 35 L. J., P. & D. 75, and L. R., 1 P. D. 192 (Farm stock, crops, etc.), and *Jones*, 1 Sw. & Tr. 14.

Court upon being satisfied that an immediate representation was necessary for the preservation of the estate, made the grant to the sister of the deceased, under this section, for the use and benefit of the next of kin, limited unto such time as he or his lawful attorney should obtain administration (a).

Absence and minority.

A. died intestate leaving four children, of whom one was of age, but was abroad, and the others were minors, and an immediate grant being necessary, it was made, under the statute mentioned, to the duly elected guardian of the minors, for their use and benefit, limited until some one of them should apply for it (b).

To person who had paid debts of deceased.

The Court granted administration under this section to the attorney of the person entitled, who was in India, under the following special circumstances: The intestate died owing debts exceeding his personal estate. Gifts of money had been made to him by C., a relative of his deceased wife, and after his death his debts were paid by C. There were only two next of kin and persons entitled in distribution, and of these, one renounced, and the other was a lunatic, and his next of kin renounced on his behalf (c).

Renunciation and consent in favour of creditor.

Where a person being the sole party interested in, and the sole party entitled to represent, the estate of a deceased, died without having taken out a grant, and his personal representative had filed a renunciation and a consent to the grant being made to a creditor of the party so originally interested and entitled, the Court made the grant under this section to such creditor (d).

Estate insolvent, next of kin unfit.

Where the deceased, a paper manufacturer, was alleged to be insolvent at the time of his death, and

(a) *Cholwill*, *supra*. (b) *Burgess*, 32 L. J., P. & M. 158.

(c) *Baseman*, L. R., 2 P. & D. 242.

(d) *Emma Fraser*, L. R., 1 P. & D., 327.

his next of kin was a woman of dissipated habits and unfitted to carry on, or wind up the business, the Court, under this section, granted administration to a principal creditor, who applied for the same with the sanction of other creditors (a).

The nearest relatives of the minor children of a deceased, having been abroad for many years without having communicated with their friends in England, the Court of Probate there permitted the children to elect another person to take administration on their behalf of the estate of their father without citing such nearest relatives in the first instance (b). Election by minors.

The Court granted administration under this section to the guardian, elected by minors, for their use and benefit, without requiring the citation or renunciation of their next of kin, where the property was very small, and the next of kin in Australia, and their interest was infinitesimal (c). Estate small, and next of kin absent.

The sole executrix and universal legatee, having died in the testator's lifetime, and the next of kin being abroad, the Court under this section granted letters of administration, with the will annexed, to the guardian of persons entitled in distribution (d). Sole executor dead, and next of kin abroad.

A person dying intestate, leaving her only sister solely entitled in distribution, a lunatic, and without any committee of her estate or person, administration was under this section granted for the use and benefit of the sister during her lunacy, to the stepmother, who was co-executor and co-trustee with deceased of the father's will, and beneficially interested under it. Surviving cousins not being cited (e). Person entitled, a lunatic.

(a) *Farrande*, L. R., 1 P. & D. 439.

(b) *Burchmore*, L. R., 3 P. & D. 139.

(c) *Hagger*, 3 Sw. & Tr. 66.

(d) *John See*, L. R., 4 P. D. 86.

(e) *Mary Burrell*, 1 Sw. & Tr. 64.

Where person entitled was a lunatic in Asylum, and maintenance due.

Where a pauper lunatic, an inmate of a public asylum, on whose account arrears of maintenance were due, became entitled to money on the decease of her mother, a grant was made under this section to the public officer, for her use and benefit, limited to the period of her lunacy, a citation having issued (a).

Separate property.

Administration (will) was granted to the nominees of the residuary legatee who was a married woman, without notice to her husband, the residue being settled to her separate use, and at her absolute disposal (b).

Husband's consent dispensed with, he being abroad.

A. died a spinster and intestate, leaving her mother and one sister; the mother had married a second time, and her husband was abroad; the Court without requiring the renunciation of the husband, upon the mother's consent granted administration to the sister (c).

Bankruptcy and absence of executor.

The deceased executed a will in which she appointed an executor, who subsequently became bankrupt and left the country. The property being small, on the consent of the next of kin the Court, by virtue of this section, granted administration (will) to one of the parties interested under it (d).

When executor named could not be found.

A testator nominated as executor "William George, of 4 Finsbury Square, Watchmaker," who on the death of the testator could neither be found nor heard of, and the Court under this section granted administration (will) to one of the residuary legatees (e).

Doubtful legitimacy.

The legitimacy of next of kin being doubtful, and

(a) *Findlay*, 3 Sw. & Tr. 265; see also *Slumbers*, 34 L. J. P. & M. 93; and *Windeatt v. Shortland*, L. R. 2 P. & D. 217.

(b) *Sine*. L. R. 1 P. & D. 338.

(c) *Llanwarne*, 36 L. J., P. & M. 25.

(d) *Elvira Louisa Cooper*, L. R., 2 P. & D. 21.

(e) *Sawtell*, 2 Sw. & Tr. 448.

a representative having been agreed upon, the Court under this section appointed such representative (a).

A person entitled to the whole estate, under an intestacy, being abroad, wrote to a cousin with certain directions as to securing the amount of the property, and transmitting a small sum to him, the Court, under the section referred to, granted administration to the cousin for the use and benefit of the person entitled, limited to carrying into effect the directions contained in the letter (b). Letters of instructions.

The section was held to apply to a case where assets were transmitted from abroad for distribution to those entitled, and a grant issued to one of them, limited to the property so transmitted (c). Assets transmitted from abroad.

So a grant was made under this section where administration was applied for on presumption of death, by the next of kin of the presumed deceased and there was a doubt as to whether the intestates father predeceased him (d). Presumption of death.

The section has also been held to enable the Court so to make its grant as to follow a foreign grant in respect of the person to whom it should be committed (e). Foreign grant followed

In the absence of special circumstances the Court refused to make a grant under sec. 73, E. Probate Act (sec. 54 S. Act.) to the nominee of the next of kin, (f) notwithstanding the case of *Farrell v. Brownbill* (g), which was distinguished as a case in which the Court granted administration to the nominee of the next of kin, in order to carry out an Grant refused.

(a) *Hopkins*, L. R., 3 P. & D. 236.

(b) *Drinkwater*, 2 Sw. & Tr. 611.

(c) *Hughes*, 3 P. & D. 140.

(d) *Atell*, 31 L.J. (N. S.) P. M. & A. 38; see *Peck*, 2 Sw. & Tr. 506; *Smith*, Ib. 508; and *How*, 1 Sw. & Tr. 53.

(e) *Eart*, 36 L. J., P. M. 127; and see *Cosnahan*, L. R., 1 P. & D. 183, and *Hill*, L. R. 2 P. & D. 89.

(f) *Richardson*, L. R. 2 P. D. 244.

(g) 3 Sw. & Tr. 467; 33 L. J. (P. M. & A.) 185.

arrangement come to by the parties to stop litigation which was pending as to the person entitled to the grant (a).

The consent of all the persons interested is not a sufficient ground for departing from the general rules as to grants of administration (b). The Court, (Lord Penzance) remarking that it could not "make the grant asked for in that case, under the section, without materially laying down the rule that whenever the parties interested like to consent that some person nominated by them shall take the grant, it will make the grant to such nominee."

The proper course to be pursued under such circumstances is indicated *In the goods of Bullar* (c) and followed by Sir James Hannen *In the goods of Hale* (d), namely,—that the next of kin or persons entitled should "take the grant and then appoint a nominee to be their attorney."

Upon an application under this section for letters of administration limited to the applicant's interest in the remainder of a term, the deeds shewing the deduction of title were required to be brought into the registry (e).

CHAPTER VII. SECTION I.

GRANTS DE BONIS NON.

Where a grant having been obtained, the chain of executorship is broken or a sole administrator or administrator with will annexed dies, leaving the estate

(a) *Teague & Ashdown v. Wharton*, L. R., 2 P. & D. 361.

(b) *Richardson*, *supra*. See also p. *ante*.

(c) 22 L. T. (N. S.) 140.

(d) L. R., 3 P. & D. 207.

(e) *F Keene*, 28 L. J. (N. S.) P. & M. 35.

unadministered in part, the Court will commit administration afresh of the goods of the deceased left unadministered by the former administrator or executor (a).

This is called administration *de bonis non administratis*.

Where one of two executors proved the will and died it was held that the one who had neither proved nor renounced should be cited before administration *de bonis non* could be granted to a legatee (b).

Persons entitled to administration, unlike executors, are at liberty to retract their renunciation and take a *de bonis* grant upon the death of the original administration (c).

An original grant of administration having been made which was afterwards for cause shown, recalled and cancelled, administration *de bonis non* was granted to the widow (d).

In making such grants, the Court is governed by the same rules which apply to original grants, and will grant administration with or without a will annexed, of the deceased's unadministered effects to the same persons only who have a right or interest sufficient to have entitled them to original grants, if they had applied for them, the executors of course being excepted.

Rule in making *de bonis* grants.

The chain of executorship may be broken or interrupted by the means or under the conditions following (e) :—

Chain of executorship how broken.

(a) *Re John Wesley*, dec. Ct. Prob. U. C. Nov. 1848; *Re Sproule*, dec. Surr. Ct. York & Peel, 1860; and *Re Wilkin*, Surr. Ct. Co. York, Dec. 1877; *Thornbeck*, *Ibid.* Sep. 1873; *Frederick Widder*, *Ibid.* Nov. 1879, and see D. & B. 432, and Coote, 163.

(b) *Sarah Leach*, dec., Deane & Sw. 294.

(c) *Skeffington v. White*, *supra*.

(d) *Re Bigger*, Surr. Ct. York & Peel; *temp.* Hon. S. B. Harrison, Surrogate (1862).

(e) Coote, 164.

1. When the immediate sole acting executor dies intestate.

2. When the survivor of the immediate acting executors dies intestate.

3. When the remote sole acting executor, to whom an executorship has been transmitted *per calenam*, dies intestate.

4. When the survivor of the remote acting executors dies intestate.

5. When the remote executor or executors renounce the probate of their own testator's will, or have been cited and have not appeared.

6. When the remote executor or executors die without having proved their own testator's will.

7. When of two or more executors who have died after probate taken by them, it is impossible to show which survived the other or others (a).

8. In the case of an executrix being a *feme covert*, when probate of her will limited to the executorship has not been taken out.

9. Where one of the executors having renounced before 1 Sep., 1858 (Vide S. C. A. sec. 59, *ante*), has survived the other executor or executors.

Administration (will) *de bonis non* to residuary legatee, &c.

In all these cases the Court will grant administration, with the will annexed, to the residuary legatee in trust or to the beneficial residuary legatee, or to others, in subjection to the rules which govern original grants (1).

To a legatee or creditor.

Administration (will) is granted to a legatee or a creditor, or to the representative of a deceased lega-

(1) By Imp. Stat. 11 Geo. IV. & 1 Will. IV. c. 40, Executors are by Courts of Equity to be deemed trustees of undisposed of residues for the benefit of such persons as would be entitled in distribution in case of intestacy.

(a) *Richards v. All persons, &c.*, 4 No. Ca. App. p. viii.

tee or creditor, on the renunciation of the residuary legatee.

The representative of a deceased legatee must swear that his deceased's legacy has not been paid ; and in like manner the representative of a deceased creditor will swear that the debt still remains due (a).

If the former grant were made to a creditor or a legatee, his representative, if the debt or legacy be still unpaid, or any other creditor or legatee may take administration (will) *de bonis non*, without any further renunciation on the part of the residuary legatees.

In ordinary cases the grant of administration (with the will annexed) *de bonis non* includes the testamentary papers of which probate was originally granted. But if a codicil be discovered at or about the time of administration *de bonis non* being applied for, the grant will pass of the will already proved, and of the codicil lately found (b).

In all cases of administration, with the will annexed, *de bonis non*, the applicant for such a grant must be sworn to and mark the original will when he makes his oath, or, if he cannot attend in the registry where the same is deposited, the original probate or letters of administration with the will annexed, or an office copy of the will under the seal of the court must be annexed to his oath and marked by him in lieu of the original will. In such cases he will swear that the grant "contains the last will and testament, &c.," of the testator (c).

Original will or original grant marked by the intended administrator (will) *de bonis non* on being sworn.

When an administrator dies, leaving part of his deceased's goods unadministered, the grant *de bonis non* will go to the persons who would have been equally entitled to the original administration.

Administration *de bonis non*.

(a) Coote, 165.

(b) *Ib.*, 166.

(c) *Ib.*

To next of kin, &c.

This observation applies to next of kin, to persons entitled in distribution, and to all others having an interest in an intestate's personal estate.

To persons having a derivative interest.

A person having a derivative interest may be admitted to take administration (with will annexed) *de bonis non*, or mere administration *de bonis non*, under the same conditions as he would be allowed to take an original grant (a).

Not required to nominee of the Crown.

Letters of administration *de bonis non* are no longer required in the case of grants made to the Attorney-General for the time being, as Her Majesty's nominee, the original grants being made to that functionary, and his successors in office (*ante* p. 219).

With substance or copy of will annexed *de bonis non*.

If an executor who has taken probate of a copy or the substance of a will, or if the grantee of letters of administration, with such copy or substance annexed, die, leaving part of the testator's estate unadministered, letters of administration, with the copy or substance of the will annexed, *de bonis non*, will be granted upon the general principles regulating all grants, if it be again shown by affidavit that the original will has not been found or recovered, or transmitted, according as the case may be. But if the original will be forthcoming, the grant will assume another form (*vide post*).

For the use and benefit of a lunatic.

If the person, who would otherwise have taken an administration (with or without a will) *de bonis non*, be a lunatic, or of unsound mind, administration *de bonis non* will be granted for his use and benefit upon the principles referred to *ante* p. 253-9.

Administration of the rest of effects unadministered.

Administration *de bonis non* was granted to the executors of one of the next of kin, for the use of the other next of kin, who was imbecile, passing over to the next of kin of the latter, but required proof that the grant so made would be for the advantage of the imbecile next of kin (b).

(a) Coote, 166.

(b) *Rev. W. Southmead*, 3 Curt. 29.

If an administrator *cæterorum* die without fully administering an estate committed to him, a grant of the rest of the deceased's effects so left unadministered will be made to the same order of persons who would have been competent to have taken an original grant. Save and except.

And the same observation applies to the case of administration, *save and except*, left unadministered by the original grantee.

If on the death of an executor who has taken probate, or of an administrator who has taken administration, limited to a particular estate or fund, that estate or fund be left unadministered or untransferred, limited letters of administration (with or without will) of the unadministered goods of the deceased will be granted to parties having the same kind of interest which the court recognised in the original grant. Limited administration (with or without will) *de bonis non*,

If an executor has proved his testator's will, and has administered the estate, with the exception of a legacy which has been set apart and remains invested in the original testator's name, the court on the death of the executor and the interruption of the chain, with the consent or upon the citation of the residuary legatees, has granted administration (with the will annexed) *de bonis non* to the legatee, limited to his legacy (a). Limited administration (will) *de bonis non* to legatee.

But these cases are exceptional, and very unusual in practice, the court, as a general rule, never granting limited administration to any person entitled to a general grant (b).

In law, also, it may be considered that a serious objection applies to such a form of grant.

(a) *M. Steadman*, 2 Hagg. 59; *Biou*, 3 Curt. 741; see also *Watts*, 1 Sw. & Tr. 540; *Lady Catherine Somerset*, L. R., 1 P. D., 351; *Coote*, 169.

(b) S. C. R. 13, *ante*.

Limited administration *de bonis non* of a trustee's effects.

When the executors of a trustee, who had invested a trust fund in his own name, have died, breaking the chain, and the fund still remains to be administered, the *cestui que trust* of that fund, or his nominee, may obtain administration of the unadministered goods of the deceased trustee, limited to the trust fund, upon the consent of the deceased's residuary legatee.

And a similar limited grant, under corresponding circumstances, will be made where the trustee has died intestate. The renunciation and consent of his next of kin, and the persons entitled in the distribution of his personal estate, will be required in this case before the limited administration *de bonis non* will be granted.

Limited administration *de bonis non* to attend proceedings in Chancery.

When the grantee of administration limited to attend and substantiate proceedings in Chancery, or any other court, dies before the termination of the proceedings, he leaves goods unadministered, and a new grant may be made to another nominee.

If the constituent in a power of attorney, for whose use administration has been granted, die in the life time of the administrator, administration *de bonis non*, not *cessate*, is the form in which the subsequent grant is made (a).

If the original administrator has died without discovering or reducing into possession and paying duty upon an admitted part of the deceased's estate, the applicant for administration *de bonis non* (with or without will annexed) must do what the former ought to have done, and give security in the full or integral value of the estate and effects of the deceased.

The bond is for double the amount of the integral estate as formed of the sum originally sworn to, and the sum omitted.

(a) Coote, 170.

But in his oath he swears the *unadministered* property under its real and existing amount (a).

SECTION II.

SECOND OR SUPPLEMENTAL GRANTS (b).

When the original grant has been limited for any specified time, or until any specified event or contingency shall happen, a new grant must be made upon the efflux of the time and the accomplishment of the event or contingency referred to in the original probate or letters of administration. Second or supplemental grants.

But although this form of grant is only required when the deceased's estate has not been fully administered, it is distinguished from grants *de bonis non* as being a re-grant of the whole of the deceased's personal estate as sworn to and embraced in the original grant. Their nature.

Accordingly, the estate, on the second grant being applied for, must be sworn under the same amount for which the original grant was taken, however much of the estate may actually have been disposed of by the first grantee (c). It is an absolute and permanent grant, following a temporary one (d). And as the first grantee is, in some cases at least, regarded by the court as the agent or representative of the succeeding one, the court cannot, in the case of intestacy, take a less security than for the whole of the deceased's estate, as it was when the original grant was made (e). Estate to be sworn under the original amount.

If an executor, being appointed for his life take probate, the latter ceases with his death, and the executor substituted in the will at the decease of the former takes a further probate. Probate to substituted executor.

(a) Coote, 177. (b) These are commonly called *cessate* grants.

(c) *Abbott v. Abbott*, 2 Phill. 578. (d) *Ibid.* (e) *Ibid.* 579, 580.

If an executor be appointed for a shorter time than his life, or under any other limitation of time, and take probate, the grant ceases upon the expiration of the term or the fulfilment of the limitation, and the substituted executor, if there be such, takes probate.

Supplemental grants are made in the following cases :—(a)

Probate of original will after probate of substance.

When probate having been granted of the substance of a will, or of a copy of a will, limited until the original or an authentic copy, or more authentic copy thereof, shall be brought in, the grant ceases on the original, or an authentic or more authentic copy being discovered and brought into the registry, and the executors take probate of the original will, or authentic or more authentic copy as the case may be.

After grant to attorney.

To an executor upon the ceasing of a grant made to an attorney for him.

After grant *pendente lite*.

To the person entitled after a grant *pendente lite*, the suit having been determined.

After grant to guardian.

To a person entitled after a limited grant to a guardian which has ceased, either by reason of attainment of majority of the person entitled, or the death of the guardian or minor before that event.

Committee of lunatic.

To a person entitled upon the cessation of a grant to a committee or next of kin of a lunatic, upon the death of either or the recovery of the latter.

The grant may be to a new guardian or a new committee, according to the circumstances (b).

A supplemental probate was granted, limited to the property which a testatrix, a *feme covert*, held as executrix (c).

(a) Coote, 172.

(b) Penny, 4 No. Ca. 660.

(c) *Rachael Bayne*, 1 Sw. & Tr. 132. But see *Richards*, L. R. 1 P. & D. 157.

SECTION III.

ALTERATIONS IN GRANTS.

The Ecclesiastical Courts had the power of altering and amending grants, which was continued to the Court of Probate in England by the 17th sec. of the Court of Probate Act, 1858.

It may occasionally happen that after a grant has been made, an error is discovered, *e. g.*, in spelling the Christian names or surname of the deceased; in describing the *status* of the deceased (*a*), or in setting forth the time of the deceased's death, or other matters. In regard to the deceased.

In limited grants, also, there may have been a misdescription of the property which is to be administered, or there may have been a misrecital of the power under which a will has been made, or of a deed under which the trust has been created (*b*). Or the limitation.

In all these cases an order may be obtained in Chambers that the required amendment be made in the grants, on the necessary proof and identification being adduced. By order.

In grants of administration, if the administrator find it necessary to increase the amount of the estate of the deceased, he makes an affidavit as to the increased amount, and gives a further administration bond in double the amount of the *whole* estate. But the English Court of Probate has, under the 82nd section of the Court of Probate Act (1857), (corresponding with sec. 62, S. C. A. *ante*) allowed the fresh bond to be given in double the amount of the accretion in value only (*c*). Amount of estate increased.

After this has been done, the Registrar notes upon

(a) *Towngood*, L. R. 2 P. & D. 408.

(b) *Coots*, 175.

(c) *Weir*, 1 Sw. & Tr. 506.

the letters of administration that the estate has been resworn, and that further security has been given accordingly.

This practice of increasing the sworn amount of the estate is, in England, provided for by Statute, and appears to be partly for revenue purposes, where too little stamp duty has been paid. See Coote 176.

If the administrator be abroad another person will be permitted to make the affidavit and execute the bond (a).

Where original grant lost, &c.

If the original grant has been lost, or is inaccessible, a notation or alteration is made upon an exemplification of it.

Administrator limited to proceedings in Chancery may increase.

An administrator, limited to attend and substantiate proceedings in Chancery, &c., who for this purpose will have sworn the deceased's estate under £50, may be afterwards resworn and give security in any increased amount (b).

Bond re-executed, or new bond.

In cases where the alteration is not in the amount of the deceased's estate, the administration bond is sometimes re-executed, and sometimes a new bond is given. A new bond is required where the personal attendance of principal and sureties at the registry cannot be given, for it has been a rule, that a bond once executed shall not be delivered out of registry for re-execution (c).

Probate not altered where codicil found.

If a codicil be found after probate of a will has been granted, a separate probate is granted of that codicil, and the first probate undergoes no alteration or amendment whatever. If, however, the appointment of the executors under the will is annulled or varied by the codicil, the probate must be brought in and revoked, and probate will be

(a) *Sutherland*, 4 Sw. & Tr. 189; 31 L. J. P. & M. 126; *Ross*, 2 L. R. 275.

(b) Coote, 178. But see *Jones v. Howells*, 12 L. J., N. S., Chanc. 369, and *O. Dodgson*, ante.

(c) Coote 179.

granted anew of the will and codicil. But should an unattested or unexecuted paper, incorporated by the testator in his will, have been omitted from probate, that probate may be amended by engrossing the former into it (a). Further engrossment in probate.

All the facts stated in explanation of an omission or mistake are to be proved by affidavit.

Where the explanation shows fraud or *mala fides* on the part of the grantee, the court is not so facile in permitting the alteration.

Where an executrix being a married woman took probate as a spinster, the court would not allow her name and description to be altered without her husband's consent (b). Not allowed.

SECTION IV.

WILLS PROVED AND GRANTS MADE ACCORDING TO FOREIGN LAW.

Where the testator or intestate had no fixed place of abode in or resided out of Ontario at the time of his death, *proof of the will*, or in case of intestacy, *proof that the deceased died intestate* is *infer alia* by sec. 34 S. C. Act, *ante*, necessary to enable a Surrogate Court to make a grant.

A foreign (c) grant of administration (d) or letters probate (e) does not apply to assets in this country.

The law on this subject as stated in a leading case (f) in England is applicable in this Province:—

(a) *Sheldon v. Sheldon*, *ante*.

(b) *Rev. W. Hale*, 5 No. Ca. 514, 515.

(c) Foreign, in this connection, is to be understood as relating to everything not in Ontario; see *Dicey's Law of Domicile*, Lond., 1879, p. 1.

(d) *Grant v. McDonald*, 8 Gr. 468; *Re Thorpe*, *ante*; D & B. 63.

(e) *Price v. Dewhurst*, 4 My. & Cr. 81; *Enohin v. Wylie*, 10 H. L. 19 (1862); *Logan v. Fairlie*, 2 Sim. & St. 291; *Smith*: 2 Rob. 332.

(f) *Enohin v. Wylie*, *supra*, and see *Shaver v. Gray* *ante*.

"Personal property in this country belonging to a foreigner, or a British subject domiciled abroad, can only be obtained, in the event of his death, through the medium of a representative in this country. If he has died intestate, administration will be granted here limited to his personal estate in this country. If he has left a will, valid by the law of his domicile, and has thereby appointed executors, probate of that will must be obtained here.

Succession follows domicile.

In every case the succession to personal property will be regulated, not according to the law of this country, but of that of the domicile."

Domicile.

It is said (a) that it is the province and duty of the Court of Probate to ascertain what was the domicile of the testator or intestate, because it is the law of the domicile that governs the disposition of the personal or movable property of the deceased (b); and by which the questions as to what constitutes a will of personal property, who has the capacity to make a will, and what forms and ceremonies are essential to its validity or whether the deceased does or does not die intestate, are to be determined (c).

Law as to moveables.

A testator's domicile is inferrible from his description (d).

Domicile, definitions of

That is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning (e). Two things must concur to constitute domicile, (1) residence; and (2), the intention of making it the home of the party (f). Domicile means the place or coun-

(a) D. & B. 41; and see *In Re Goodhue*, 19 Gr. 366.

(b) *Osborne deceased*; 1 Deane & Sw. 4, and D. & B. 42.

(c) Dicey, p. 25.

(d) Coots, 213.

(e) Story's Conflict of Law, 6th Ed., p. 37, citing Vattel.

(f) Bowyer's Civil Law, 166.

try which is considered by law to be a person's permanent home (*Dicey*, p. 1). It is also defined (*Phillimore*, s. 49) to be a residence at a particular place, accompanied with an intention to remain there for an unlimited time.

Change of domicile is proved by facts and actions, not by a simple declaration (*a*).

The domicile of the husband is, during coverture, the domicile of the wife (*b*).

A minor cannot acquire a domicile other than of origin (*c*).

The domicile of origin, which arises from birth and connection, remains until clearly abandoned, and another is taken; and of two acknowledged domiciles, in the absence of evidence, that of origin prevails (*d*).

The domicile of residence is *prima facie* evidence of the domicile of origin.

"Before granting probate of a foreign will (which Probate of Foreign Will may be taken to apply to all testators domiciled abroad), the Court will require to be satisfied of one of two things;—either that the will is valid by the law of the country where the testator is domiciled, which can be proved by the affidavit of an expert in that law,—or that a court of a foreign country has acted upon it and given it efficiency."

"The practice of the Prerogative Court was somewhat lax with regard to admitting foreign wills to probate, and lately more than one foreign will has been admitted to probate in this country, which, as

(a) *Phillimore's Juris.*, p. 162 : D. & B. 36. And see further as to evidence of domicile : *Jessup v. Simpson*, 14 U. C. Q. B. 213.

(b) *McDonald v. McD.*, 5 L. J. U. C. 66 ; *Edwards v. Edwards*, 20 Gr. 392.

(c) *Somerville v. S.*, 5 Ves. Jr. 787.

For exceptions to this rule see *Dolphin v. Robins*, 7 W. R. 674.

(d) *Somerville v. Somerville*, *supra*.

(e) *DeBonneval v. DeB.*, 1 Curt. 863. See also *Munro v. Munro*, 7 Cl. & Fin. 891.

it afterwards turned out, was not valid in the country where it was made. In future, therefore, the registrar will require something more than a mere notarial certificate to be furnished." "The mere fact that a will has been deposited with a notary amounts to nothing."

"The Court will be satisfied with *prima facie* evidence that a will has been recognized and acted on by a foreign court; but it will not give effect to a document in respect of which there is no evidence whatever before it that it is a good will." (a)

It is evident that the cases under the section of the Act referred to are to be considered in two different ways :—

1. A grant has already been made in the country of domicile;

2. The grant is first applied for in a Surrogate court in this Province.

"The court has no power to grant probate of any foreign will unless it is *prima facie* satisfied by some document or another that such will has been recognised as valid by the foreign court; or unless it is proved a valid will according to the law of the place where the testator was domiciled" (b).

In the first class of cases a Surrogate Court will adopt the foreign letters as the foundation for its own grant (c).

It is an established practice of the English Court of Probate that where a will has been proved in a foreign court, a duly authenticated copy will be admitted to probate without further evidence of the validity of the will, as it is presumed that the foreign court has been satisfied on that point (d).

(a) *Per* Sir J. P. Wilde, in *Deshais*, 34 L. J. (N. S.) P. M. & A. 58.

(b) *Per* Sir J. P. Wilde in *DeVigny*, 34 L. J. N. S. (P. M. & A.) 58.

(c) *Hill*, L. R. 2, P. & D. 90. (d) *Smith*, 16 W. R. 1130.

But a copy of a foreign will authenticated by a notarial certificate merely is not sufficient. Some document equivalent to probate is required. "If," said Sir J. P. Wilde, (a) "you can show me any document that purports on the face of it to be equivalent to probate, any act of the foreign court the language of which carries to my mind in any shape or form that the foreign Court has adopted the document as a will, that will be sufficient for me."

Notarial certificate insufficient.

As to cases where a grant has been made in England, the law as stated by Lord Mansfield, C. J., in *Burn v. Cole* (b) has continued to be followed in this country to the present time; viz., that where the deceased resided in England, and had assets there as well as in a British American plantation, the Judge of Probate in the plantation was bound by the administration granted by the Prerogative Court in England to grant to the same person.

English grants

Upon filing an exemplification of letters probate or letters of administration granted by the Probate Division, High Court of Justice, in England, or of the grants of the former courts, having probate jurisdiction in England or of grants made in Ireland, a Surrogate Court in this Province will adopt such grant as the foundation for a new grant as to the personalty here (c).

English and Irish grants. Exemplifications.

A similar practice prevailed in the former Court of Probate for Upper Canada (d).

Exemplifications, as understood in the Surrogate Courts, are in the form, and as to the particulars

(a) *DeVigny, supra*. But as to Quebec, see R. S. O. c 62, secs. 32, 33. (b) Amb. 416.

(c) *Cuthbert, Dec. Surr. Ct. Co. York, 1879. Ann Gee Macaulay, Ib. 1862; B. Burnett Ib. 1874; Rev. Thos. Schrieber, Ib.; F. V. Northey, Ib., 1879.*

(d) *Sir James Monk, 1831; Maj. Gen. Hy. Darling, 1837; Sarah Shuter, 1856. W. R. Sanders, 1854 (Ireland, Exemp. from P. C.).*

contained in them, according to the forms *ante*, p. 112; which follow the forms of the English Court of Probate.

Scotch grants. In Scotland, if the deceased has left a will or a deed of Trust Disposition and Settlement, or other writing, naming an executor, such executor may obtain from the Sheriff of the County, in his capacity of Commissary of the County, "Confirmation of the Testament," which is evidenced by a certificate under the seal of office of the Commissariat and signature of the proper officer, called a "Testament, Testamentar or Confirmation of an executor nominate" (a). If the deceased was domiciled abroad or his domicile be unknown, the Sheriff of Edinburgh acting as Commissary grants confirmation.

This corresponds to what is known in England as probate of a will (b).

If the deceased has left no will, or a will not naming an executor, the Commissary may constitute an executor dative *quod*, next of kin (or other character). The official certificate in this case is a "Testament Dative," and corresponds to letters of administration or administration with the will annexed in England or this Province.

Attention may be called to the fact that real or heritable estate cannot be disposed of by will in Scotland. Any instrument affecting realty must be a deed *inter vivos*. The appropriate conveyance is a Trust Disposition and Settlement. This instrument, although a deed by the law of Scotland, is not a deed, according to the law of Ontario; as it is not under seal. Consequently it does not affect real estate here as a deed. A difficulty arises in obtaining registration of such an instrument in the Registry office. It is suggested that in cases of this nature a copy of the Trust Disposition and Settlement be obtained from the Sheriff court books or the books of Council and Session authenticated by the seal of the court, and appended to the exemplification of the Confirmation, and registered as a will. The Disposition, although a deed *inter vivos*, is executed *mortis causa*.

(a) *Vide* Imp. Stat. 21 and 22 Vict. c. 56.

(b) *Patterson's Comp. E. & S. Law.*

As it may be of importance to parties resident in Scotch grants, this country to know the order of choice observed by the Commissary in the appointment of executors dative, it has been thought advisable to mention it.

The order is :—

1. The universal (*i.e.* residuary) legatee, including trustees.
2. The next of kin.
3. Children or descendants of any predeceasing next of kin.
4. The widow.
5. A creditor.
6. A legatee.

And when it becomes necessary that a personal representative should be appointed of the estate of the same deceased in this Province, a Surrogate Court will, upon filing an exemplification or an authenticated copy of the will and testament-testamentar or of the testament dative, as the case may be, in the registry, grant probate or administration with the will annexed to the proper parties.

The deceased having been domiciled in Scotland *Instances.* at the time of his death, and possessed of personalty in this Province, Surrogate Court grants have been made as to such property as follows :

Administration with the will annexed was granted to the attorneys under power of attorney from executors, confirmed in Scotland, of a mutual Disposition and Deed of Settlement, upon filing an authenticated copy certified to have been "Recorded in the Commissary Court Books, Lanarkshire, to which was appended a copy of the testament-testamentar or confirmation of the executors nominate in the form prescribed by 21 & 22 Vict. c. 56 Imp. Stat. under the seal and signature of the Commissary" (a).

(a) *In the goods of John McDowell, dec.* Surr. Ct. York & Peel, 1862.

On filing an authenticated copy of a will "extracted from the Register of Deeds, &c., in the books of the Council and Session" under the seal of the Council and Session and the signature of the proper officer (a).

And in a case of intestacy,—administration was granted to the agent of the estate in this country who had received a power of attorney from the duly appointed administratrix in Scotland (b).

Quebec and
other colonies.

Exemplifications of grants from the Province of Quebec (c); and other British colonies (d), are acted upon by Surrogate Courts in Ontario.

The same practice would appear to be applicable to a will that has been proved in the Consistorial Court of the Bishop of Sodor and Man, or in the Decanal Court of Jersey or in any foreign court, it being presumed that the court in which the original will is deposited is competent to deal with the matter, and has been satisfied of the validity of the will, no affidavit of law or domicile being required (e).

United States.

Exemplifications from Surrogate or Probate Courts in the United States, which are Courts of Record, having seals, generally contain a transcript of the record, showing all the proceedings had before the court, upon which the court based its order or decree for the grant to issue. They cover the same particulars as the forms referred to, *ante* p. 112; and are issued under the hand and seal of the court. Upon such an exemplification being filed, a Surrogate Court in this Province will follow it in making a grant as to personalty here (f).

(a) *In the goods of the Rev. Alex. Pollock*, Surr. Ct. Co. York, 1878, and *Re Neil Roger dec.*, *Ib.* 1877.

(b) *In the goods of Sir Alexander Mackenzie*, Ct. Prob. U. C., 1822.

(c) *Hon. Peter McGill*, Surr. Ct. York & Peel, 1861; *W. Lyman*, Ct. Prob. U. C., 1857. (d) See *Appendix*, Ont. Stat.

(e) Coote, 3rd ed. p. 161, & *Ib.* 8th Ed. 212.

(f) *R. S. Buchanan* (N. Y.) Surr. Ct. York & P., 1862; *Ann J.*

If the will of a domiciled foreigner be in English, *Translation.* a copy of the English original, not of the registered translation into the foreign language, will be required for probate in this country (a).

In a late case a person domiciled in Mexico made a will according to the law of Mexico, but written in English. The proper court there decreed probate of a Spanish translation and not of the original. Application was made for administration (with the will) limited to property in England. *Per Cur.* "The certified translation of the original will is the proper document upon which I must act. The courts here give credit to a foreign tribunal for having duly investigated the facts upon which it proceeded; and in this case I find that the foreign court has recognised the existence of a will in a particular form as contained in a Spanish, or alleged Spanish, translation of the original will. That, therefore, is the only document on which I can proceed, and upon that document being translated into English I shall act upon it." Administration with the will so translated annexed was granted (b).

Office copies of wills from a foreign court in which a seal is used cannot be proved unless the seal of the court be affixed to them (c).

In the goods of Lt. Col. Laurent Quetton St. George (Ct. Prob. 1822), the testator domiciled in France, had made his will in the French language, which had been proved according to the laws of that country. Probate was granted upon a notarial copy of the original in the French language being filed, together with a translation into English made by a person proved to be conversant with both languages, Probate of Foreign Wills.

Madden (La.) 7th., 1879; *F. Chatham* (N. Y.) *Ib.*, 1879. The same practice prevailed in the former Court of Probate U. C. *Vide John Bay* (N. Y.), 1850.

(a) *Dehais*, 4 Sw. & Tr. 14.

(b) *John Rule*, L. R. 4 P. D. 76.

(c) *Coots*, 212.

and sworn to before a notary public in this Province.

The signature of the notary, certifying the copy of the French Probate was certified by the President of the Civil Tribunal whose signature, as qualified, was certified by the British Vice Consul.

In the case of a Russian will, proved in Russia, the Court of Probate in England allowed a copy of it to be made from the Russian probate, and permitted that copy to be proved (a).

Grant first
applied for in
Ontario.

As to the second class of cases ;—

If the testator die abroad it is generally assumed that he was domiciled in the country in which he died, and evidence must be given showing that his will was executed in conformity with the law of such country before it will be admitted to probate. The law is proved by the evidence (usually by affidavit) of a practising advocate in the courts where it is administered (b).

The certificate of the British Ambassador, under the seal of the legation, has been received (c).

If it be the fact that the testator, though residing or dying in a foreign country, was not domiciled there, but in Ontario, the requisite negative proof will have to be given, viz., by affidavit (d).

In this case the will is tested by the law of Ontario. In making its grants the court will, in some instances, adopt the rules of foreign law, though they clash with its own fixed principles. Accordingly the court will apply to the word *executor* the same sense of limited duration which the French

(a) *Carke*, 15 W. R. 881 ; 36 L. J. (N.S.) P. & M. 72.

(b) *Bonelli*, 45 L. J. (N. S.) P. M. & A. 43 ; *Bristow v. Sequerville*, 5 Exch. 275, and D. & B. 372, and *Re C. J. Campbell*, Surr. Ct. Co. York, 1879.

(c) *Klingmann*, 3 Sw. & Tr. 19, see also *Ann Dormoy*, 3 Hagg. 767.

(d) *Coots* 211.

law attributes to it, and will pass over such executor if his time has expired (a).

Where the will is in a foreign language, a translation made by an English notary is annexed to the will, or office copy of the will, when application is made for probate. The executor is sworn to the foreign original, but the translation alone is engrossed and registered (b).

A will made in France in the English form by a Frenchman who had been naturalized in England, but retained his French domicile, was admitted to probate in England under the French law (c).

The Court will also defer to the rules of foreign Administration law in granting administration of the estate of a domiciled foreigner (d).

There are special statutory provisions in England as to admitting to probate the will of a British subject made out of the United Kingdom, whatever may be the domicile of such person (e).

SECTION V.

REVOCATION OF GRANTS.

The grant of probate in common form is a revocable act (f).

Power of Surrogate Courts to revoke.

Grants of this description, and grants of letters of administration may be revoked at any time upon cause shown, there being no limitation either by statute or by common law (f).

In the Ecclesiastical Courts the period of thirty years constituted prescription (f).

(a) *Lannerville v. Anderson*, 30 L. J. R. (N. S.) 25.

(b) *Coote*, 213.

(c) *Lacroix*, L. O. 2 P. & D. 97.

(d) *Isabella Stewart*, 1 Curt. 904; *David Rogerson*, 2 Curt. 656; *Viesca D'Aramburia*, 2 Curt. 377; *Beggia*, 1 Add. 340 and *Coote* 210.

(e) Imp. Stat. 24 and 25 Vict. c. 114.

(f) D. & B. 539, and note.

A Surrogate Court (a) possesses, and, when it becomes necessary, exercises the power of revoking or annulling for a just cause any grants which it has made; and in so doing, it only resumes into its own hands the powers which it parted with on false or inaccurate suggestions.

The revocation may be either upon the application of the grantee himself (which has been called a surrender), and is then a non-contentious proceeding as distinguished from a revocation made in an adverse suit; or in contentious proceedings (b).

The court will revoke any of the three following classes of grants at the petition of the grantee himself, and with his consent and co-operation, or without his consent and in pain of his contumacy (c).

Grounds of revocation.

Directly false suggestions.

Firstly—A grant made to a person who has no interest. Such a person having obtained the grant fraudulently, and *malâ fide*, in either of two ways, viz: by making a directly false suggestion, or by surreptitious and clandestine conduct, in concealing from the court something material to the case, which it should have known.

1. Probate of a forged or revoked will.
2. Probate of a will obtained whilst a suit is depending touching its validity in another court, viz; that of the deceased's domicile (d).
3. Probate of a will of a *feme covert*, made without power for that purpose (e).
4. Probate obtained by an executor, being a minor on the tacit suggestion or understanding that he was of full age (f).

(a) See sections 14 and 56, S. C. Act.

(b) D. & B. 542, & In the goods of *Rowland Webster deceased*, Court Prob., U. C. 1845.

(c) *Vide* Coote, 3rd Ed, 140.

(d) *Trimbletown v. Trimbletown*, 2 Hagg. 248.

(e) *Alicia Gill*, 1 Hagg. 341. *Sed qu.* as to revocation of Probate in such case, since the Wills Act, Ont., (*vide ante*, p. 169.)

(f) Coote, 187.

5. Letters of administration granted to a woman claiming to be the relict of an intestate, but who has not been legally married, or is counterfeit altogether (a).

6. Letters of administration granted to persons claiming to be next of kin, who are in fact, illegitimate relatives only, or mere imposters or not next of kin, there being others nearer (b).

7. Letters of administration granted of the estate, or letters probate of the will of a living person (c).

Secondly—It revokes a grant for the same want of interest, where it has been obtained on a false suggestion made by the party in ignorance only, or *per incuriam*. This class of cases will necessarily include many described under the first head : False suggestions made *per incuriam*.

1. Where a will has been discovered after administration has been taken.

2. Where a later will has been discovered after probate taken of an earlier will.

3. Where probate has been taken of a will without a codicil or codicils afterwards discovered, which revoke or add to the appointment of executors under the will.

4. In cases analogous to *Warren by his guardian, v. Kelson* (d), where the Court of Chancery, after grant made, differed from the Prerogative Court in its construction of the will, the Court of Probate revoked the grant and gave a fresh one to the person who was entitled to the residuary estate by the decision of the Court of Chancery.

5. Where administration was granted to the elected guardian of the intestate's children, there being a testamentary guardian who had not renounced (e).

(a) *W. Moore*, 3 No. Ca. 601.

(b) *Bryman*, 2 No. Ca. 22.

(c) *Chas. J. Napier*, 1 Phill. 83.

(d) 28 L. J. (N. S.) 124.

(e) *Louisa Morris*, 5 L. T. (N. S.) 768.

Under this head also, will rank the case where letters of administration (with a will annexed) have been issued upon the renunciation of an executor, who had previously intermeddled in the estate of the testator, and who has been afterwards compelled by the court to take probate (*a*).

Supervening
defect of operation in
grants.

Thirdly—It revokes a grant which has been lawfully made, but has subsequently become inoperative and useless through circumstances; or which, if allowed to subsist, would prevent the administration of the estate.

1. Where a grant has passed the seal after the party applying has died.

2. Where a *feme covert* having taken probate of a will, of which she is executrix, without the consent of her husband, and he refuses to join in her acts (*b*).

3. Where a *feme* executrix has taken probate, but her husband having become a lunatic, is incapacitated from joining in her acts (*c*).

4. Where a *feme* executrix and her co-executor jointly prove a will, but the husband of the former, before the estate has been dealt with, leaves the country with the intention of never returning (*d*).

Cases for revocation under
third head.

In revoking these probates, the court requires from the executrix an affidavit that she has not intermeddled in the testator's estate (*e*).

5. Where one of two executors proves a will, and becomes a lunatic, the other executor, after the lunacy of his co-executor, takes probate himself (*f*).

6. Where administration (with will annexed) has been granted to two or more residuary legatees, of whom one subsequently becomes a lunatic (*g*).

(a) Coote, 188.

(c) Coote, 188.

(e) Coote, 188.

(g) Phillips, Add. 336; 3 Curt. 429.



(b) Joanna Wilkinson, 3 Phill. 96.

(d) E. Dye, 2 Rob. 343.

(f) Marshall, 1 Curt. 297.

In these two last-mentioned cases, fresh grants are made to the sane executor or administrator. In the former a power is reserved of making a grant of probate to the lunatic executor, whenever he shall become of sound mind (a). ^{Power reserved.}

7. When administration has been granted to a *feme covert*, whose husband has afterwards refused to join with her in the administration of the estate (b).

8. Where one of two or more administrators becomes incapable and of unsound mind (c).

In the latter case a fresh grant is made to the capable administrator (d).

9. Where a tenant for life of a certain fund, after taking administration thereto, assigned his interest therein to the remainderman, the court has made a grant to the remainderman (e).

10. Where a creditor, after a grant of administration, with or without will, has paid himself his debt, and left the country (f).

11. A creditor, having been paid her debt, was desirous *bona fide* of retiring from the administration of the estate (g).

In the last mentioned case the court, upon proof of these facts, and "that there were no actions or suits at law or in equity touching or concerning the estate and effects of the deceased, and the grantee's administration thereof, depending between her and

(a) Coote, 189.

(b) *Ibid.*

(c) *Newton*, 3 Curt. 428 ; *Phillips*, 2 Add. 355. (d) *Ibid.*

(e) *Ferrier*, 1 Hagg. 243 ; Coote 189.

(f) *Jenkins*, 3 Phill. 33. The 74th section of "The Court of Probate Act, 1857, has since rendered revocation unnecessary in this state of things, by allowing a grant to be made *durante absentia*." Coote, 189 ; and possibly section 54, S. C. Act would have a similar effect in Ontario.

(g) *Edward Hoare*, 5 L. T. (N. S.) 708, in note, and 2 Sw. & Tr. 361, in note.

any other person," revoked the grant and decreed administration to one of the intestate's children.

It is said that the court can deal, at discretion, with grants made to creditors, for they are appointees of the court.(a).

There are some other cases which do not come under the three general heads before mentioned.

Other cases for
revocation.

If administration (with the will only annexed) has been granted, and a codicil be afterwards found, a separate grant cannot be made of the latter, as in the case of a probate, but the administration (with the will annexed) must be revoked, and a new administration taken, with both the will and codicil annexed.

An administration may be revoked *quia improvide, i. e.*, where on a false suggestion in respect to time of the intestate's death, it has been issued before the expiration of a fortnight from that event, although it should be again granted to the same person (b).

The same rule would seem to apply when it has been issued through the *incuria* of the registry, and without any false suggestion on the part of the applicants, viz., where the day of the deceased's death has been truly stated.

Though it may be doubted that the court could revoke a grant obtained through the *incuria* of the registry, viz., in spite of a caveat duly entered and subsisting, yet it is clear, that so jealous is the court upon the subject of a grant made after a caveat entered, even though that caveat has expired, that in one case it stated that a grant obtained under such circumstances, without giving notice to the party

(a) *Menzies v. Mulbrook*, 2 Curt 850. •

(b) Coote, 190, citing Toller's "Law of Ex'ors."

who had entered it, was obtained, "to use a tender expression," irregularly (a).

The court never revokes a grant made to a wrong person except where the person having an immediate right to the grant which is to take its place and be substituted for it, asks for it and is prepared to take it at the time of his application to have the other grant revoked (b). On whose application revocation made.

The revocation of the first grant and the substitution of the new one are made at the same time. Accordingly, the court cannot revoke at the application of a creditor, whatever may be the merits of the case, because such creditor cannot demand a grant to be made to himself of immediate right (c).

The court requires the revoked grant to be produced and delivered to the registrar at the time of its revocation, so that it may be afterwards cancelled in the registry.

If the proceeding be compulsory, *i. e.*, by citation of the party he will bring it into the registry or suffer the penalty of contempt (a).

If it be impracticable to compel the production of the grant owing to the party having left the country, the court will revoke it, though it cannot cancel it (e). Exceptions.

If the grant has been lost or mislaid so that it cannot be found, the court will revoke it notwithstanding it is not forthcoming. But the court has required an undertaking from the grantee to bring it in if it should be found (f).

A revoked grant of administration has been allowed to remain in the hands of the solicitors of the administrator who had a lien upon it (g).

- (a) *Trimblestone v. T.* ante. (b) See *Phillips v. A Icock*, 2 Lee, 98.
 (c) *Bergman*, 2 No. Ca., 23. (d) *Coot*, 192.
 (e) *Cotter v. Field*, 6 No. Ca. 182; and *Langley*, 2 Rob. 408.
 (f) *J. Carr*, 1 Sw. & Tr. 111.
 (g) *Barnes v. Durham*, L. R. 1 P. & D. 729.

As the court will only revoke a grant upon just cause, it will not revoke a grant made to a person on the suggestion of his being sole next of kin, though other next of kin are afterwards discovered and though all parties interested consent that the grant shall be revoked and a new grant made to another party, one of such other next of kin (*a*).

It will not revoke a grant limited to attending proceedings in the Court of Chancery before the suit is ended, in order to enable the next of kin, who had been cited, to obtain a general grant (*b*).

Nor will the court revoke such a grant on the application of the executor of a will if he cannot show that inconvenience would result from the continuance of the limited administration. The court is unwilling to disturb a grant without just cause, or where the executor could take a probate *cæterorum* (*c*).

But in *Curry* (*d*) under nearly similar circumstances the court refused to grant a probate *cæterorum*.

The Court will not revoke a grant made on the refusal of a party cited, and not appearing, but long afterwards coming in, unless there was misrepresentation in the first instance in obtaining it (*e*).

Subsidiary
grant.

There are other cases, also, where the Court does not revoke; but though it does not revoke the old grant, it makes a new grant of a subsidiary nature (*f*) dependent upon the circumstances which have called for it.

If a sole executor become a lunatic, or of unsound mind, the court will make a new grant to the com-

(a) *Mary Hyslop*, 1 Rob. 457.

(b) *Brown*, L. R. 2 P. & D. 456.

(c) *Harris v. Milburn*, 2 Hag. 62-

(d) 5 No. Ca. 54

(e) *Lopez v. Hartley*, 7 No. Ca. 32 Supp.

(f) *L. Crump*, 3 Phill. 499; and see *Anon. L. Lee*, 625.

mittee of his estate (if there be one) for his use and benefit, until he shall become of sound mind.

If a sole administrator becomes of unsound mind the court will make a similar grant to his committee.

In cases where the new grant is made to a committee the old grant remains at large, and is not required to be impounded.

In the case of the executor, if there be no committee, the court will make a new grant to the residuary legatee named in the will, of which the executor has taken probate for the use and benefit of the executor until he shall become of sound mind.

When administration was granted to the intestate's widow, who subsequently became of unsound mind, the court made a new grant to the intestate's son for the use and benefit of the administratrix, until she should become of sound mind (a).

Upon this authority it may be presumed, that in a case where the administrator, being one of the next of kin, has become of unsound mind, the court would make a new grant to another next of kin for his use, &c. And it may also be presumed, in a case where the administrator is the next of kin, the court would make the new grant upon the same principle to a person entitled in distribution to the intestate's estate (b).

In these last-mentioned cases the Court does not revoke the grant, but directs it to be impounded in the registry during the grantee's incapacity to make a legal use of it, the intention being, that, on his recovery, it should be redelivered to him to make what use of it he can.

The court will also, for cause shown, revoke letters of guardianship, and make a new grant (c).

(a) *Henry Binckes*, 1 Curt. 286.

(b) *Coote*, 194.

(c) *Re Phillips*, Ct. Prob. U. C., Sep. 1861; and see General Rule, p. 130 *ante*.

CHAPTER VIII.—SECTION 1.

CITATIONS TO ACCEPT OR REFUSE GRANTS.

When a person having the superior right to prove a will or to take administration, delays or declines to do so, the court, at the instance of a person having an inferior right, cites the person having the superior right, to take the required grant; and on his failing to do so, orders it to issue to the other. A citation therefore answers two purposes; it either compels a representation to be taken by those who are primarily entitled to it, or where they do not take, the process provides a substitute for a voluntary renunciation on their part (*a*).

A person named as executor may be cited at any time (the seven days allowed by S. C. Rule 3 having elapsed), even within a month of the testator's death, to take or refuse probate.

Persons to be cited in the case of a will, and by whom.

In the case of a will the residuary legatee cites the executor "to accept or refuse the probate and execution of the testator's will, or to show cause why letters of administration with the will annexed of all and singular the personal estate and effects, rights and credits of the testator should not be granted to him (the residuary legatee)."

Before any citation can issue in respect of a will, the will must have been filed (*b*). Sec. 22 S. C. Act provides means of compelling the production of testamentary papers.

If the Executor have intermeddled, the citation may call upon him to show cause why he should not be compelled to take probate, on account of his having acted as executor of the will of the deceased (*c*).

(*a*) Coote, 224.

(*b*) Coote, 225.

(*c*) *Pytt v. Fendall*, 1 Lee, 557.

And if there be also a residuary legatee in trust, the party citant cites the former also "to accept or refuse letters of administration with the will annexed of all and singular the personal estate and effects, rights and credits of the testator" *quod* residuary legatee in trust (a).

A legatee, or a creditor, similarly cites both the executor and the residuary legatees, or the testator's next of kin if the residue has not been disposed of.

In the case of intestacy, a person entitled in distribution cites the next of kin of the intestate and his widow, if there be one. And a creditor (b) cites the widow, if there be one, and also all the next of kin and other persons entitled to share in distribution with them. Persons to be cited, and by whom, in case of intestacy.

In the case of a person dying without known relations, a creditor must cite "all persons in general (c)."

In all these cases the preliminary step to be taken by the applicant for the citation is to make an affidavit of the facts of the case and of his interest, as no citation issues under seal of the court until an affidavit, in verification of the averments it contains, has been filed in the registry. Affidavit to lead citation.

The attorney, by power, of the party citant has been allowed to make the affidavit (d).

By the E. C. P. practice, before any citation is signed by a registrar, a caveat is entered against any grant being made in respect of the estate and effects of the deceased to which such citation relates. Caveat to be entered. This was under a Rule of 1862 (e).

(a) Coote, 225.

(b) A creditor will be allowed to take out a citation although his right of action be barred by the Statute. (*Coombs*, L. R. 1 P. & D., pp. 193, 288, and 36 L. J. P. & M. 78).

(c) *Vide post*, p. 310. The citation is to be served on the Attorney-General. *Vide* App. R. S. O. c. 60.

(d) *Re Hulley*, L. R. 1 P. & D. 598. (e) Coote, 8th Ed. 373.

The practice prior to that date and as it stood 5 Dec. 1859, is shown by a rule of 19 Oct. 1858, as follows:—"Upon the issuing of a citation under the seal of the court, a caveat shall be entered in the court books against any grant being made in respect of the estate and effects of the deceased to which such citation relates;" and notice thereof was to be sent to the registrar of any district in which the deceased appeared to have resided at the time of his death, and such caveat remained in force until the proceedings following such citation were terminated (a).

In order to clear off a caveat when no appearance has been entered to a warning duly served, an affidavit of the service of the warning, or a certificate of the registrar, stating the manner of service and an affidavit of search for appearance and of non-appearance is filed.

Service of citation.

Citations are served personally whenever that can be done.

Personal service is effected by leaving a true copy of the citation with the party cited, and by showing to him the original process under the seal of the court.

On minor.

Service on a minor or infant should be effected in the presence of his natural or legal guardian, or at least of that of some person or persons upon whom his or her actual care and custody for the time being has properly devolved (b).

Where the citation was served upon two minors at the house where they resided, and both their custodian and next of kin evaded service, the service on the minors was held sufficient (c).

On lunatic.

A lunatic is personally served in the presence of

(a) 27 L. J. (1858), P. M. & A. 94, and *Horsey*, 321.

(b) *Cooper v. Green*, 2 Add 454; *Brown v. Wildman*, 28 L. J. 54; For exception see *Lainson v. Naylor*, 2 Sw. & Tr. 7.

(c) *Lean v. Viner*, 3 Sw. & Tr. 469.

the person who has the care of him or her, and if he has a committee the latter is served also.

If a committee of his estate has been appointed, service upon such committee as well as upon the lunatic is required.

When there is no committee, the service according to the practice of the Prerogative Court should be effected in the presence of a medical man (a).

If there be no committee the next of kin, if any, of the lunatic should also be served (b).

As to when the Inspector of Asylums is committee, *vide* R. S. O. cap. 220, sec. 49 (c).

A married woman must be served in the presence of her husband, or if this cannot be done, the husband must also be served; *Brown v. Wildman, supra*. Married women.

By the practice in the English Court of Probate, in the case of a party to be cited residing within the jurisdiction, when personal service had not been effected, and the citant applied for permission to proceed, an affidavit was required showing the endeavours which may have been made to serve the defendant, or bring the citation to his knowledge (d). Permission to proceed.

It is recommended that a copy of the citation should be left at his residence (e), or at his last known place of abode (f), and with the husband, wife, brother, agent (g), or other persons likely to be in communication with him.

If his address be known, it may be advisable to

(a) *In the goods of Anna H. Surtees*, dec. 28 L. J. (P. & M.) 89.

(b) *Coute*, 229.

(c) As to service on corporations, see R. S. O. cap. 149, sec. 43, and cap. 150, sec. 60. And as to substitutional service, see *Nuttall v. Nuttall*, 31 L. J. P. & M. 164, and *Miller v. Miller*, 30 L. J. P. & M. 165.

(d) D. & B. 706.

(e) *Herbert v. Herbert*, 2 Phill. 230.

(f) *Tenducci v. Tenducci*, 3 Phill. 595 & 3 Curt. 731.

(g) *Woolley v. Green*, 3 Phill. 314.

inform him of the contents and object of the citation by letter (a).

S. C. Rules 25 and 26 provide for service by advertisement in newspapers in certain cases.

Service.

Service by notice in the public papers is substituted for the old service called by the civilians *per edictum* (b).

If a citation could not be served personally, it was ordered to be served *viis et modis*, "by all lawful ways and means, so that the decree might most likely come to the hands, possession or knowledge of the party to be cited;" or a public citation, and was executed either by public edict, a copy thereof being affixed to the door of the parish church or some other public place, or to the door of the defendant's house (c).

When the person to be served was abroad (d) or was not to be found, it was the practice of the Prerogative Court to cite him by ways and means, the principal of which was the leaving of a copy at his dwelling house, if any (e), and affixing the citation on the Royal Exchange (*vide* C. R. 38 *post*), at the hour when merchants most do congregate.

By advertisement.

Citations in such cases, and citations "against all persons in general," are now served in the method provided in S. C. R. 25, by advertisement.

This is said to be constructive service, and concludes the party, though it does not conclude the court (f).

When the residence of the defendant, though abroad, was known, the court usually required that the writ should be personally served upon him (g).

The time for appearing to a citation is, in ordinary cases, eight days.

Certificate of service.

After a service, if it has been personally effected, a certificate to that effect should be endorsed upon the citation (h).

(a) *Lisdale v. Baloo*, *cit.* 1 Phill. 175.

(b) D. & B. 708.

(c) Burn's Eccl. Law, vol. 3, p. 248.

(d) *Miller v. Washington*, 3 Hagg. 277.

(e) *Collett v. Collett*, 3 Curt. 726; *Spriggs v. Banks*, 4 N.C. 102.

(f) D. & B. 708.

(g) *Ibid.* 707.

(h) *Goodburn v. Bainbridge*, 2 Sw. & Tr. p. 4.

After service, if the party cited appear and accept the grant, nothing further remains to be done by the party citant, except to apply to the court (if he think fit) for an order for the costs of citing. This question he is enabled to raise by means of the caveat before mentioned, for without that having been removed, the party cited cannot obtain his grant.

Appearance of party cited.

Caveat to be removed:

Before the party cited, though accepting the grant, can obtain it, he must take out a summons against the party citant to appear before the judge in chambers to show cause why the grant which he has accepted should not be made to him.

Summons against party citant.

Upon this summons the party citant may ask the judge for the costs of his citing the other party.

Costs.

Whether costs are asked or not, the judge will decree the grant to pass the seal to the party accepting it, and the officer of the registry will make it out in the usual way.

Grant ordered.

If no appearance be entered to the citation, the party citant will, after the time fixed by the citation has elapsed, file affidavits as to the service of the citation, and the non-appearance of the defendant.

Grant to party citant on non-appearance.

The citation itself is annexed as an exhibit to the affidavit of service when the service has been personal.

If the service has been made by means of the public journals only, the latter, or copies of the citation clipped from them and identified in an affidavit of publication, are filed.

The court is then moved, and the grant is ordered to the party citant in default of the party cited.

Where a citation has been taken out and executed by one creditor of a deceased, another creditor of that deceased will obtain administration without further citation, if he find a preference in the eyes of the court (a).

Citations at suit of creditors.

(a) *Andrews v. Murphy*, 4 Sw. & Tr. 199.

The first-mentioned creditor will enter an appearance to the citation, and either dispute the grant with the other creditor or induce him to consent. The court, if the grant be made to the creditor who has not cited, will allow the other his costs out of the estate (a).

SECTION II.

CAVEATS.

Caveats.

For statutory provisions as to caveats, *vide ante*, S. C. Act, secs. 47, 48.

Any person intending to oppose the issuing of a grant of probate or letters of administration, either personally or by his solicitor or attorney, enters a caveat in the registry.

It is competent to any person having an interest, thus to prevent a grant being issued without notice to himself.

The caveat remains in force for the space of three months; but may be renewed from time to time.

[See S. C. Rules, pp. 78, 79, 131, *ante*, as to caveats].

A copy of the warning is to be left by the practitioner at the place mentioned in the caveat as the address of the person who has entered it, or the registrar will send the warning by the public post, directed to the person who has entered it at the address mentioned in it.

Grant to issue, &c.

If no appearance be given by or on behalf of the caveator after the service of the warning within the time therein limited, the grant will be issued to the party applying, upon affidavits of the service of the warning, and of search and non-appearance.

There is nothing to preclude the caveator from ap-

(a) Coote 231.

pearing after the expiration of the time limited in the warning. If the grant has not then passed the seal, his opposition is as legal as if the appearance had been entered during the time limited by the warning.

If an appearance be entered the business becomes contentious (a).

A caveat will enable the caveator to apply for an order that the sureties of the intended administrator shall be resident within the jurisdiction of the Court, or that the administrator shall exhibit an inventory or give a bond to pay all the deceased's creditors *pro rata*.

The proceeding of a caveator in order to effect these objects is by summons (b).

SECTION III.

RIGHTS OF PRIORITY AMONG PARTIES ENTITLED TO GRANTS.

Certain applicants for probate or administration, or guardianship, have a preference or priority of recognition over others not in the same degree.

In the case of wills, the executor is *facile princeps*, and has no superior, though he has an equal in a co-executor. Executor,

The ground of the preference exercised by the court in other cases, respecting wills, may be thus stated :—That a person having direct and immediate interest is to be preferred to those entitled in representative character (c). Direct interest.

Under this rule the residuary legatee in trust has priority over the beneficial residuary legatee; and where the residuary legatees are tenants in common, Residuary legatee.

(a) S. C. Rule, 24 *ante*.

(b) Coote, 234.

(c) *Anne Middleton*, 2 Hagg. 61.

and both having survived the testator, one of them afterwards dies, the survivor has priority over the representative of the other. But where one of such legatees has died in the lifetime of the testator, and his (the testator's) next of kin are entitled to the lapsed portion, there is no preference (a).

The residuary legatee for life is preferred to the substituted residuary legatee.

A residuary legatee of whatever grade, or the representative of one (with the exception of course of the representative of a residuary legatee for life who would not be entitled to a grant at all), take priority of other legatees and creditors.

Next of kin.

In intestacy the next of kin under the Statute, 2 Hen. VIII. c. 5, have a preference over descendants and collaterals, to whom the statutes of distribution have given a share in the intestate's estate, the court granting administration only to persons entitled in distribution to the estate of a deceased person, where the statute of Hen. VIII. does not operate by reason of the death or renunciation of the next of kin (b).

A next of kin has priority over the representative of a deceased next of kin.

In intestacy a person originally entitled is preferred to a party having a derivative interest.

So a person entitled in distribution has a preference over the representative of a next of kin (c).

Attorney of

The attorney of a next of kin has priority over person entitled in distribution.

A next of kin or person entitled in distribution takes priority over creditors.

Guardians and creditors.

The guardian of a next of kin is entitled in preference to creditors (c).

(a) *Vide* Coote, 214.

(b) *Ib.*

(c) *Carr*, L. R. 1 P. & D. 292.

(d) *John v. Brudbury*, 1 L. R. 1 P. & D. 247-8; 36 L. J. P. & M. 3

A testamentary guardian has a prior right to all other guardians (a).

To enable any person having the inferior interest to take administration (will), or mere administration, all persons having priority must have first renounced or waived their rights, or having been cited must have neglected, by their non appearance to avail themselves of such rights. (*Vide* S. C. R. 9.)

Person having inferior interest.

If a person has two interests, a superior and an inferior one (*e.g.*); being an executor, and residuary legatee *conjunctim*, the court will not permit him to elect to take the grant in the inferior character (b).

Inferior and superior interest in one person.

So a next of kin, who is a creditor, must administer in his first mentioned quality.

Where the executor and residuary legatee renounce administration (will) is granted to a legatee, a next of kin, or a creditor without preference of the one over the other, according as each applies first (c).

First applicant.

SECTION IV.

PRESUMPTIVE PROOF OF DEATH.

Proof of death is part of the proof requisite to lead a grant (d).

If the death of the testator cannot be proved by sufficient witnesses, resort may be had to the presumption of law. At law a jury may presume a man dead at the expiration of seven years from the time when he was last known to be living (e).

Presumptive proof of death.

There are cases where no direct evidence enabling the applicant to depose to the date of the death can

(a) *Louisa Morris*, 5 L. J. N. S. 768 and 2 Sw. & Tr. 362.

(b) *Re Bullock*, 1 Rob. 275.

(c) *Coote*, 213, *et seq.*

(d) *Ante*, pp. 37, 76, 99, 177.

(e) *Williams on Ex'ors.* 7th Ed. p. 318.

be obtained, inasmuch as he only presumes the person to be dead from the fact of, and circumstances attending, his disappearance, at or after a given period. In such a case the applicant must lay his evidence before the court.

If the court be satisfied that the evidence leads up to a reasonable presumption of the death of the person who has disappeared, it will grant probate or administration (as the case may be), upon the applicant deposing that the person died at or after the date last given of his existence.

Advertisements.

Advertisements asking for information respecting the person supposed to be dead, are as a general rule required to be inserted in newspapers; *e. g.*, in the case of a person having been traced on board a vessel at a given date, and the vessel not having been heard of after that date (*a*). But the advertisements are not required in all cases, irrespectively of peculiar circumstances.

"Advertisements in newspapers are very well, if nothing has been heard of a person for some time. Here as you trace the history of the deceased up to a certain time, and then lose sight of him, I think they may be dispensed with" (*b*).

Sir C. Cresswell acted upon the rule, where the seven years had elapsed since the husband had been heard of, remarking that that was "a fair ground for presuming that a person is dead, but not for presuming that he died at the beginning or at the end of the seven years" (*c*).

There is no legal presumption as to the date of the death (*d*).

(*a*) Coote, 204, in note.

(*b*) *Norris*, 1 Sw. & Tr. 75

(*c*) *Elizabeth How*, 1 Sw. & Tr. 53.

(*d*) *Ibid.* and *C. W. Peck*, 29 L. J. R. (N. S.) 96; and see also *Doe v. Napcan*, 5 B. & A. 86; *Re Benham's Trusts*, 16 L. J. 349 and *W. Smith*, 5 L. T. (N. S.) 532.

The court will upon evidence assume that the presumed death took place after a certain date (a). Date of death may be assumed.

In a case where the presumed death had been established in the Court of Chancery, the Court of Probate, on an affidavit stating the facts of the case, and the Order of the Court of Chancery, dispensed with the advertisements, and granted administration to the next of kin (b).

The court will reject an application which has been made too early (c).

If administration be asked, it must be shown that the presumed deceased was intestate (d).

The next of kin must be cited where it is sought to prove a will on the presumption referred to (e).

SECTION V.

COMMORIENTES.

Occasionally the person whose estate is to be administered, and the person who, if living, would have been entitled to the grant, have perished by the same calamity as in the case of *Sillick v. Booth*, 6 Jur. 142, where the question was which of two brothers *James* and *Charles*, who were lost at sea, died first. Survivorship.

In such a case, if a claim of succession (whether *ex testamento* or *ab intestate*) be advanced on behalf of either of the persons to the estate of the other, a survivorship must be shown. And no distinction can be drawn in these cases between a claim

(a) *Elizabeth Howe*, *supra* ; *Beasley's Trusts*, 7 L. R. Eq. 498.

(b) See *Dean v. Davidson*, 3 Hagg. 544 ; and *W. T. Norris*, *supra*.

(c) *Bishop*, 1 Sw. & Tr. 304.

(d) *Coote*, 205.

(e) *Nicholls*, L. R. 2 P. & D. 461.

to property and a claim to the administration of that property (a).

The survivorship will be matter of evidence ; but there may be nothing in the facts adduced to satisfy the mind of the court that there was a survivorship. The principle upon which the court has frequently acted is stated in the case of *Satterthwaite v. Powell* (b), as follows :—

Next of kin of person in whom property vested *prima facie* entitled.

“Where a person dies possessed of property, the right to that property passes to his next of kin, unless it be shown to have passed to another by survivorship. Here the next of kin of the husband claim the property which was vested in his wife. If that claim was to be made out it must be shown that the husband survived. The property remains where it was found to be vested, unless there be evidence to show that it has been divested. The parties in this case must be presumed to have died at the same time, and there being nothing to show that the husband survived his wife, the administration must pass to her next of kin.”

Where a man, his wife and child, were drowned at sea, and nothing was stated beyond these circumstances, the court granted administration (with the will annexed) to the next of kin of the husband, there being nothing to show that the wife survived (c).

The decision in *Underwood v. Wing* (d) appears to have settled the law on the subject. A husband, a wife, and three children having been lost in the *Dalhousie* on their passage to Sydney, and the proof adduced not satisfying the court that there was a survivorship of any or either of them, it was held that the property (*i. e.* of the husband) would go to

(a) Coote, 206.

(c) *Murray*, 1 Curt. 596.

(b) 1 Curt. 706.

(d) 24 L. J. (N. S.) 293 *et seq.*

the next of kin of the husband, as under an intestacy; there being none who could establish a claim under his will.

In this case Lord Cranworth observed, "the real ground to proceed on is, that it cannot be proved which died first. They both probably died within a few seconds of each other, but which died first it is impossible to say. That being so, what is the result? Why here is a will made in which in one state of circumstances, namely, that if the wife died in the husband's lifetime, the property is given away. It is not proved that that state of circumstances existed, and in no other state of circumstances is it given away. Then it is not given away at all. Therefore it must be taken as upon an intestacy, and must be distributed amongst the next of kin." His Lordship remarking that "it is hardly within the range of imagination that two human beings should cease to breathe at the same moment of time, and that to proceed upon a principle that they did actually cease to breathe at the same moment would, he thought, be proceeding upon false *data*."

Sir Creswell Cresswell, following this authority, decreed administration to the next of kin of a deceased whose wife had perished by the same calamity, on the ground that there was no reason to believe that the wife survived the husband (a).

In another case the applicant for the grant swore Form of oath. "that the deceased died without child, &c., but whether or not, the deceased died a widower, or leaving a wife him surviving, I am at present unable to depose, the said deceased with his wife, L. H., being found dead side by side in the same bed; their death

(a) *Ewart*, 1 Sw. & Tr. 258; the oath stating 'that the deceased and his wife or child perished at the same time, and that there is no reason to believe that the latter survived the former.'

being the result of injuries occasioned by the falling of a wall" (a).

Administration was decreed to the next of kin of a deceased, who had perished with his wife and child in the Cawnpore massacre (b). As to the state of facts provided for by section 35 of the Wills Act, see *James Shilling*, 1 Deane, 183.

To a creditor.

If a husband and wife have perished by the same calamity and a creditor of the former is desirous of taking administration of his estate, he must obtain not only the renunciation of the husband's next of kin, but the consent of the wife's next of kin. If he cannot obtain the consent of the latter, he must cite them to show cause.

He cites them under the description of persons who would have been entitled to the personal estate of the wife, in case she had survived her husband.

On no appearance being given, administration is decreed to the creditors (c).

Where the property (d) was small and the debt was large the court dispensed with a citation of the wife's next of kin.

Will must be proved.

If the commorient to whom a representation is sought has left a will, it must be proved, though entirely inoperative under the circumstances, as giving the whole of the estate to the other commorient, as being dispositive only in case of the latter surviving (e).

SECTION VI.

RENUNCIATION.

The right of a person entitled to probate or admini

(a) D. & B. 495 in note.

(b) *Wainwright*, 1 Swab. & Tris. 257. (c) Coote, 209.

(d) *Colvin & H. M. Proc. Gen'l*, 1 Hagg. 92.

(e) *Ib.*

on to waive or renounce such right is well shed (a).

on an executor who had not intermeddled and pronounced probate was made a party to a bill account of partnership dealings between his or and the plaintiff, the bill was dismissed as to him with costs (b).

In addition to the reference under *sec. 59* of the *Sec. 59 S. C. Act ante* p. 50, to the subject of renunciations ^{Act.}

It may be further observed that the provisions of section do not apply to renunciation made before the Act (1858) (c). As to which the privilege of retraction continues to the same extent as before (d).

The effect of the enactment is not only to give to Effect of removing executor the right of transmission, but to bar the renunciant executor from retracting his renunciation *quâ* executor at any subsequent period.

The former rule that one of two or more executors renouncing was nevertheless entitled on the death of the executor who had proved, to retract his renunciation and take probate, is now by the new rule entirely changed" (e).

Each renunciation is peremptory and cannot be retracted on the death of the acting executor (f).

If the executor renounce in person, the renunciation- Affidavit.

Doyle v. Blake, 2 Sch. & Lef. 239 (1804); *Jackson v. Whitehead*, 1. 579 (1821); *Davis*, 1 S. & M. 152, and *cas. cit. inf.*

Stinson v. Stinson, 2 Gr. 508 (1851). See also *Vannatto v. Mitton*, 13 Gr. 665.

Witham, L. R. 1 P. & D. 303, 305.

Coote, 221. See as to effect of renunciation of probate by a executor for sale of lands, *Re Gordon*, *Gordon v. Roberts*, L. R. 6 Ch. 531.

Allen v. Parke, 17 C. P. 108, referring to *Rez v. Simpson*, 3 Bur.

House v. Petre, 1 Salk. 311.

Allen v. Park *supra*; see also *In Re De La Ronde*, 19 Gr. 119, and *Is v. Gustin*, 20 Gr. 106.

tion should be accompanied by an affidavit that he has not intermeddled (a).

The case of an executor who has intermeddled before renouncing is not within the statute (b).

Although an executor who has intermeddled can be compelled to take probate, an administrator who has intermeddled cannot be compelled to take a grant (c).

Ordinarily an executor who renounces probate renounces likewise administration with the will annexed. If a party be entitled to the grant in a superior character, the court cannot make it to him in an inferior character (d).

Infants and minors renounce by their guardian, and by the same means retract their renunciation (e), a minor however is incapable of giving a consent (f).

A mother has been appointed guardian by the court to renounce on behalf of the child or children with which she is *enceinte* at the moment (g).

Married
woman.

A married woman cannot renounce without the concurrence of her husband, unless he be cited, so as to enable the court to decree administration in his absence (h).

Renunciation.

The executor may renounce probate so soon as his testator is dead, and the renunciation may be filed, provided it be accompanied by the original will (i).

The renunciation of executorship, which is an office, binds the representatives of the executor (j).

No second renunciation is required (k).

(a) *Horsey*, 102.

(b) *Badenach*, 10 Jur. N. S., 521.

(c) *Davis dec. supra*.

(d) *Rebecca Bullock*, 1 Rob. 275, 4 No. Ca. 645.

(e) *West v. Wilby*, 3 Phill. 374.

(f) *Thomas*, 1 Hagg. 695.

(g) *Coote*, 218.

(h) *Jaques, dec.* 5 No. Ca. 294. See *Lopez v. DePinna*, 2 Lee, 391 in note; *Cook v. Cooper*, 2 Lee, 388, and *Llanwarne, ante*.

(i) *M. Fenton*, 3 Add. 35.

(j) *J. Perry*, 2 Curt. 655.

(k) *Harrison v. Harrison*, 1 Rob. 406; 4 No. Ca. 434.

The non-appearance to a citation of a party having a superior interest has been considered as equivalent to a renunciation and equally binding and effective (a).

Mr. Coote, 8th Ed. 220, qualifies this with the words—"If he has been served with such process."

By a rule of 1862, E. C. P. (b) no person who renounces probate of a will or letters of administration of the personal estate and effects of a deceased person in one character is allowed to take a representation to the same deceased in another character. A similar practice appears to have prevailed before that date (c).

A seal is not essential to the validity of an instrument of renunciation (d).

The renunciation of an executor cannot (unless by special leave of the court) be retracted; but it is otherwise in the case of a person entitled to administration (e).

The renunciation may be retracted at any time before the grant of administration has actually passed the seal (f).

It would appear that the court is not concluded by the Act, but may permit an executor to retract his renunciation in a proper case, (g) he being prepared to show that his retraction is for the benefit of the estate or of those who are interested under deceased's will (h).

An executor is barred from retracting his renun-

(a) *Horsey*, 102.

(b) 31 L. J., Pt. 3, Ct. Prob. p. 40. (c) *Rebecca Bullock*, *supra*.

(d) Doe. d., *Ellis v. McGill* 8 Q. B., 224; and *Boyle*, 3 Sw. & Tr. 426.

(e) *Crucifer v. Reynolds*, cit. 3 Hagg. 215.

(f) *Yorke v. Manlove*, 3 Hagg. 215 in note; *McDonnell v. Prendergast*, 3 Hagg. 212 (1830).

(g) *Badenach*, 3 Sw. & Tr. 466; See also *Morant*, 3 P. & D. 152.

(h) *Gill*, L. R. 3 P. & D. 113.

Court not concluded by renunciation.

ciation *qua* residuary legatee, if he has renounced in that character also (a).

H. P. W. sole executrix and universal legatee renounced her right, as such, to the grant of letters of administration, which was accordingly made to G. W., one of the next of kin. Upon the death of G. W. intestate and insolvent, H. P. W. was allowed to retract her renunciation as universal legatee, and to take a grant of letters of administration *de bonis non* (b).

Retraction
by next of kin.

In case of a simple administration granted to a person entitled in distribution, or to a creditor, on the renunciation of the next of kin the latter may, on the administrator's death, retract and take administration *de bonis non* (c).

A person who has renounced by his guardian retracts in the same manner as if the renunciation had been his own direct act.

But the retracting party may only take administration in the form in which it was originally granted, particularly if a consent on his part has accompanied the renunciation. So, where on the next of kin renouncing and consenting, administration was granted to a creditor for the use of the widow during her lunacy, the court would not, on the death of the administrator, allow one of the next of kin who retracted to take an absolute grant of administration *de bonis non*, but gave him one limited as before (d).

Retraction
before the
grant passed,
refused.

In a case where the next of kin had renounced, in order that a creditor might take, and one of them applied to be allowed to retract before the administration passed the seal, the court refused to permit it, and held him to his renunciation (e).

(a) See *Richardson*, 1 Sw. & Tr. 515, (1859) and *Morrison*, 2 Sw. & Tr. 130; *R. Bullock* 4 No. of Ca. 647 overruled. Coote, 222, in n.

(b) *Wheelwright*, L. R. 3 P. D. 71.

(c) *Skeffington v. White*, 1 Hagg. 702.

(d) *Thomas Newton Penny*, 1 Rob. 426. (e) *C. Noel*, 4 Hagg. 203.

In all cases of renunciation, save in that of an executorship, on the death of the renunciant his representative may take a grant to the same deceased, without retraction; for a renunciation, except in the case of executorship, does not bind representatives (a). Retraction not required.

Refusal, shown by non-appearance to a citation, requires no retraction. The party so refusing may, on the death of the administrator, come in and take a grant *de bonis non*. He is, however, subject to precisely the same rules which regulate a retraction, and has no more privileges than the person who has renounced in form (b).

CHAPTER IX.

INVENTORY AND ACCOUNT.

Any person interested in an estate whether as a next of kin, as being entitled in distribution, or as a legatee, or creditor, may call upon the administrator or executor who has become the legal personal representative of the deceased to exhibit an inventory of the estate, and to render an account of his administration thereof (c). This was done under the Court of Probate Act (U. C) (d), and has continued to be the practice in the Surrogate Courts (e). The inventory should contain a statement of

(a) *Thomas Newton Penny, supra.*

(b) Coote, 2nd Ed. 170.

(c) See Form of Oath and Condition of Bond, *ante* p. 102-3; and Coote, 232, and *vide post* C. B.

(d) *O'Kell Jones*, Ct. Prob. 1849; *Robt. Hamilton*, *Ib.* 1824; *Richard Hatt*, *Ib.* 1827 (*testate*); *Patrick Smyth*, *Ib.* 1830 (*testate*); *Downey*, Surr. Ct. Y. O. & P. 1850.

(e) *In the goods of Samuel Zimmerman, dec.*, Surr. Ct. Y. & P., 1858; *Fredk. Holdenworth*, *Ib.* 1858; *Thos. Davidson*, *Ib.* 1860; *Alex. McGlashan*, *Ib.* 1861.

all the goods, chattels, wares and merchandize, as well moveable as not moveable, which were of the person deceased at the time of his death within the jurisdiction of the court. A proper inventory should enumerate every item of which the personal estate consisted, and should specify the value of each particular (a). But unless by order of court, or in obedience to a citation, an inventory does not set forth the goods and chattels in detail. The court has power to determine what sort of an inventory it will require (b).

Powers of
former Court
of Probate as
to calling for
account.

By section 13 of the Upper Canada Court of Probate Act, it was lawful for the Judges of Probate and Surrogate respectively to call, by citation, administrators to account for and touching the goods of intestates within their several jurisdictions; and the same section provided for making distribution of residues after the term of one year from death, and for taking security against demands which might arise after distribution, that distributees should refund to administrator rateably. The first of the above-mentioned powers or duties is continued to the Surrogate Courts (c). But suits for legacies or for the distribution of residues were no longer to be entertained by them.

A cessate administrator may call upon the original administrator to exhibit an inventory and account. Thus where administration had been granted to a guardian *pendente minore ætate* of a widow, and the widow on coming of age renounced in favour of a creditor, it was held that the creditor had a right to call on the original administrator for an inventory and account (d).

An inventory may be called for at any short period

(a) D. & B. 560, & cas. cit.

(b) *Ib.*

(c) S. C. Act, sec. 15, s. 2. 3.

(d) *Taylor v. Newton*, 1 Lee, 15; see also *Beatty v. Haldan*, *supra*.

after administration. A fiat for the filing of the inventory is in special cases made simultaneously with the grant. There does not appear to be any time limited before which either the account or the inventory may not be called for (a).

Disobedience to the citation is followed by attachment for contempt.

Inventories and accounts may be brought in voluntarily without awaiting the compulsory proceeding by citation.

This jurisdiction, it is remarked by Mr. Coote, p. 232, is preserved to the Court of Probate by the 23rd section of the Court of Probate Act, 1857. By force of sections 15 & 52 S. C. Act, it would appear to be preserved to the Surrogate Courts of Ontario.

The executor or administrator files his accounts, Executor's accounts. verified by affidavit, in the office of the Registrar of the Surrogate Court, together with a petition setting forth the facts briefly, and praying that the accounts may be examined, audited, and allowed, and a compensation fixed, or to that effect—following the language of the statute (b). Auditing and passing accounts.

An appointment is then obtained from the judge, Appointment. for examining, auditing, and passing such accounts, and fixing the compensation or allowance of the executor or administrator (R. S. O. c. 107, s. 41) (c).

The appointment is to be served as the judge directs upon persons interested in the estate.

An attendance by the judge for purpose of audit is provided for in Schedule "B," *S. C. Act*.

The account may show payment of legacies, or distribution of residue.

(For form of Appointment and Account *vide* Appendix).

Vouchers for disbursements should be produced and Vouchers. numbered to correspond with the items in the account.

(a) Coote, 232.

(b) *Vide ante* p. 152.

(c) *Id.*

Although no order is made finally discharging the accounting party or his sureties, yet the passing of the accounts as above mentioned, being a judicial proceeding under the statute together with the protection thrown about an executor or administrator by the Property and Trusts Act (R. S. O. c. 107, s. 34), upon his complying with its provisions, would seem to render his position as secure as it could be made by any such order of Court.

Notice to creditors.

Executor protected.

In the case of *Clegg v. Rowland* (a), the testator died September 1860, and in November the executor issued the notice (b) to the creditors, provided for in the statute referred to, publishing it in several newspapers, and on the 1st February following, having paid the creditors, distributed the whole net residue of the personal estate, paid such part as was payable to legatees, absolutely to such legatees; and there was no part of the estate left in his hands *quâd executor*. It was held that the executor so distributing the assets after issuing the advertisements, and taking the steps pointed out by the section above referred to, would have the same protection as if he had administered the estate under a decree of the Court of Chancery.

Guardians.

A Surrogate Court may also require a guardian of infants to account, in the same manner as an administrator (*vide ante*, p. 68).

Donatio mortis causâ.

A donation *mortis causâ* is not the subject of a grant of letters probate (c).

Not included in account.

Such a gift does not vest in the personal representative (d), and need not be included in the executor's or administrator's accounts (e).

(a) 3 L. R. Eq. 368. (b) For Form of Notice, *vide Appendix*.

(c) Burns Eccl. Law, vol. 4, p. 139, 140, and cases cit. Wms. on Exors. 7th ed. 781.

(d) *Ib.* 770.

(e) *Delmotte v. Taylor*, 1 Redfield, N. Y. Surrogate Court Rep. 417, citing Eng. and Am. cases; and see *Ward*, 2 Redfield, 251. See also *Harrison v. Morehouse*, 2 Kerr, N. B. Rep. 590, and cases cited.

PART IV.

THE PRACTICE OF THE SURROGATE COURTS IN CONTENTIOUS BUSINESS.

CHAPTER I.—SECTION I.

JURISDICTION OF SURROGATE COURTS IN CONTENTIOUS BUSINESS.

By the term "CONTENTIOUS BUSINESS" is to be understood all proceedings in Surrogate Courts, or the Registries thereof, not included in S. C. Rule 1, *ante* (a).

Contentious
Business.

It includes "Matters and Causes Testamentary," comprehending (by interpretation clause, *ante*) all matters and causes relating to the grant or revocation of Probates of Wills or Letters of Administration (b). It also includes suits or contested proceed-

(a) See also E. C. P. Rule 1, C. B., *post*. As to the Rules of the English Court of Probate prior to 5th December, 1859, frequently referred to in this chapter, *vide* head note to Appendix A, *post*.

(b) *Vide ante* p. 16.

ing in relation to the grant or revocation of letters of guardianship (a); and generally all questions, causes, and suits in relation to matters within the jurisdiction of those Courts (b).

In sections 14 and 15, S.C. Act, *ante*, the same general language is used in defining the powers of Surrogate Courts as that used in the Imperial Statute, section 4, defining the jurisdiction of the former Court of Probate in England. Saving the jurisdiction of the Court of Chancery referred to, *ante* p. 22, the determination of the question whether a given paper constitutes a will of personalty, and whether it be valid as a testament, belongs to the Surrogate Courts of this Province (c).

The former Court of Probate (U. C.) possessed similar powers (d).

It is for a Court having probate jurisdiction to say whether a paper propounded is, or is not, entitled to probate before making or refusing a grant.

It was said by the Lord Chancellor, in *Price v. Dewhurst* (e), that the Court of Chancery "knows nothing of a will of personalty, except such as the Ecclesiastical Court has by Probate adjudged to be the last will."

"In a Court of Probate, where the *onus probandi* most undoubtedly lies upon the party propound-

(a) *Ante* pp. 65-6, 70-1, 131.

(b) *Ante* p. 23.

(c) *Wilson v. Wilson*, 24 Gr. 393; see also *Beatty v. Haldan*, 4 App. R. 246; *Tucker v. Smith*, Surr. Ct., Co. Ontario, 1873; *Curtis v. MacNabb*, Surr. Ct., Co. York, 1879; *Irwin v. Broden*, Co. Simcoe, 1879.

(d) *Benjamin Canby*, Ct. Probate, U. C., 1841; *Johnson, Jackson v. Johnson*, *ib.*, 1845, and *Abraham Peterson*, *ib.*, 1829. By 22 Vict. c. 93, abolishing the Court of Probate, U. C., all original suits pending in that Court on 1st Sept., 1858, were transferred to the Surrogate Court, York and Peel.

(e) 4 Myl. & Cr. 80; and see Chancery and Probate jurisdiction in England compared. *Flood on Wills of Personalty*, 557, 561, & *cas. cit.*

ing the will, if the conscience of the judge, upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied that the paper in question does contain the last will and testament of the deceased, it is bound to pronounce its opinion that the instrument is not entitled to probate" (a).

This question involves the *factum* ⁽¹⁾ of the will, "which means not barely the signing or formal execution, but also proof, in the language of the *condidit* that the testator well knew and understood the contents thereof, and did give, will, dispose and do in all things as in the said will is contained" (b).

A business becomes contentious when in a proceeding an appearance has been entered by any person in opposition to the party proceeding; (c) or when in a proceeding a citation has been extracted against a party supposed to be interested therein; or when an application for a grant of probate or administration is made on motion, and the right to such grant is opposed.

Commence-
ment of con-
tentious
business.

SECTION II.

PROBATE IN SOLEMN FORM.

There are two kinds of Probate, viz., Probate in Common Form, and Probate in Solemn Form of Law.

(¹) Under the title "*Factum* of the Will," the learned authors already referred to (d) consider the questions: "1st, by what law the validity of the will is to be determined: 2nd, the capacity to make a will; and 3rd, the nature and form of the will,—and therein of the execution, revocation, and revival of wills."

(a) *Baker v. Batt*, 2 Moo. P. C. 317, 319; cit. in *Wilson v. Wilson*, 22, Gr. 84.

(b) D. & B. 33, referring to *Zacharias v. Collis*, 3 Phill. 179.

(c) See *ante* p. 79, and *post* C. R.

(d) D. & B. 34.

Probate in common form has been treated of in previous pages.

Probate in solemn form.

Probate in solemn form is in the nature of a final decree pronounced in open court (*a*). To obtain such a decree or order the following are the ordinary requisites:

Ordinary requisites for obtaining probate in solemn form.

1st. That the executor of the will to be proved, or failing him, a residuary or other legatee, or a party interested under the will, cite the next of kin and other parties entitled in distribution to the personal effects of the deceased in case he should have died intestate, or the executors or parties interested under a prior will, to appear in the cause (Form No. I), unless they shall by anticipation have become parties to it, by having entered a caveat against the grant, and an appearance upon the caveat being warned.

When the deceased has died without any known relation, or was a bastard, the Attorney-General of the Province is to be cited (*b*).

2nd. That the executor, or residuary or other legatee, or party interested under the will, propound the will in a declaration (See Form No. VII).

Practice.

3rd. That the court shall be satisfied, upon the examination of one (*c*) or more witnesses, that the will was duly executed, and that it is the will of a competent testator.

Difference in effect between probate in common and solemn form.

The difference between the effect of probate in common and in solemn form is this:

Probate in common form revocable.

Probate in common form is *revocable*. An executor who takes probate in common form may subsequently, at the instance of any party whose inter-

(*a*) Coote & Tris., 3rd ed. 213.

(*b*) *Ante* p. 220.

(*c*) To prove the execution of a will it is necessary to examine one only of the attesting witnesses. *Belbin v. Skeats, ante*.

est is adversely affected by the will, and without limitation as to time (a), be required to bring in the probate, and be put upon proof of the will in solemn form (b).

Whereas probate in solemn form when once granted is, *with one exception, irrevocable* as against all persons who were cited to see proceedings, or who can be proved to have been privy to those proceedings (c). Probate in solemn form generally irrevocable.

But if a will of subsequent date is afterwards discovered, the probate of the earlier one, though granted in solemn form, would be revoked. Exception.

SECTION III.

PARTIES.

1st. Parties who, as Plaintiffs, are entitled to prove a Will in Solemn Form.

(1) The executor is the person upon whom this duty primarily devolves, provided he is willing to act. Who may be plaintiffs.

He may prove a will in solemn form (1) by his own mere motion, or (2) by compulsion—at the instance of a party whose interest is adversely affected by the will.

(a) The Imp'l Statute of Limitations (3 & 4 Will. 4, c. 27) does not apply to the granting or revocation of probates or letters of administration in so far as they relate to personal property. Nor does the Statute of Limitations, R. S. O. c. 61.

(b) *Hoffman v. Norris*, 2 Phill. 231, n.; *Merryweather v. Turner*, 3 Curt. 802, 817; *Sarah Topping*, 2 Rob. 620.

(c) *Newell v. Weeks*, 2 Phill. 224; *Bell v. Armstrong*, 1 Add. 372; *Budcliffe v. Barnes*, 2 Sw. & Tr., 486; but as to an heir at law or devisee, see S. C. Act, Sec. 49. See also, as to powers of Court of Chancery, *ante* pp. 12, 22.

An executor may prove a will in solemn form of his own mere motion

Risk and inconvenience of not proving a will in solemn form in certain cases.

He may do so of his own mere motion (a). It is always competent to an executor to prove a will in solemn form. In many cases, as a matter of prudence, it is highly expedient that he should do so. For his own protection this course would seem advisable, whenever serious doubts are entertained as to the validity of the will, or when there is a risk or an apprehension of its validity being at a future time contested. The force of this observation will be best seen by an example.

An executor takes probate of a will in common form, and pays a legacy under such probate; the probate is subsequently called in, and is revoked on the ground of the invalidity of the will; the executor may be required to refund the legacy so paid in error. He is of course entitled to call upon the legatee to whom he paid it to recoup him, but supposing the legatee is unable to do so, he will then have personally to bear the loss (b).

It is, moreover, very often inconvenient for an executor at a distance of time from the death of the testator, to be put on proof of a will in solemn form. Sir John Dodson on this point says, "I know of no way in which executors can protect themselves from that inconvenience, except by examining the attesting witnesses before taking probate" (c).

"But, by the practice of the Court of Probate, to prove a will in solemn form, it is sufficient to examine *one* (d) only of the attesting witnesses, unless the court requires the production of the other."

(a) D. & B. 641, and *ante*. Sec. 49, S. C. Act, and note. Executors cannot cite legatees to propound a codicil. They may propound a will and cite persons interested under the codicil; *Benbow deceased*, 30 L. J. P. & M. 171.

(b) *Vide ante*, sec. 57, S. C. Act, and note as to revocation of probate, and acts done before revocation; Coote & Tris., 3rd ed., p. 215.

(c) *In the Goods of Sarah Topping*, *ante*.

(d) *Belbin v. Skeats*, *ante*.

An executor may be put on proof of a will in solemn form (by compulsion) at the instance of any person whose interest is adversely affected by the will.

An executor may be put on proof of a will by compulsion. At the instance of parties showing some interest.

To entitle a person to put an executor on proof of a will, he must show that he has some interest in impugning the will, however small (a). Thus a person in the character of the next of kin would have a right to oppose all the testamentary papers of the deceased, yet he would not have a right to oppose one paper only in which he has no interest.

A possibility of interest is sufficient (b) to entitle him to do so.

A possibility of interest sufficient.

The following are the parties by whom an executor may be put on proof of a will : (c)

The parties entitled to put the executor on proof of a will.

1. The widow and next of kin of the deceased, and all other persons entitled in distribution to his personal estate in the event of his dying intestate, or their representatives; and in the event of his dying without known relations or a bastard, the Attorney-General (d).

Widow and next of kin, &c.

2. A legatee named in the will in question, if his legacy is omitted in the probate, or his representative.

Legatee in will.

3. An executor or a legatee named in a prior testamentary instrument of the deceased or their representatives.

Executor or legatee in any other will.

It is open to any one of these to put the executor on proof of the will either before or after he has taken probate in common form. But the two following can only do so before probate in common form has been granted (e), viz.:—

(a) *Bascomb v. Harrison*, 2 Rob. 118.

(b) *Kipping v. Ash*, 1 Rob. 270; 4 No. Ca. 177; *Crispin v. Doglioni*, 2 Sw. & Tr. 17.

(c) *Coots & Tris.*, 3rd ed. 216.

(d) *Vide ante*, p. 220.

(e) *Dabbs v. Chisman*, 1 Phill. 159.

Creditor in possession of administration.
Appointee of court.

4. A creditor in possession of administration.

5. A person in possession of administration under section 54, S. C. Act as appointee (a) of the court, without having a beneficial interest in the estate of the deceased.

When an executor is bound to prove a will in solemn form.

But an executor may think fit to refuse to act. If, however, he has taken probate in common form upon being cited he is bound to proceed to prove in solemn form. So also if, since the death of testator, he has intermeddled in the administration of the effects of the testator, *i. e.* done any act in relation to his effects, showing an intention to accept the executorship, or any act which would make him liable as executor *de son tort* (b), it is obligatory upon him, if required by any of the parties interested, to prove the will in solemn form (c). When he has not so compromised himself, he is at liberty to refuse to act (d).

If an executor decline to prove a will in solemn form, the person entitled to the residue, or a legatee, &c., may propound it.

The usual course for an executor who is unwilling to act, is to renounce probate. Should he omit or decline to do so, the person entitled to the residue, or a legatee named in the will, or their representatives, may cite the executor, or other parties interested. The executor, upon being cited, has then one of four courses open to him :

1. To appear and pray time to consider whether he will act or not (e);
2. To appear and propound the will himself;
3. To appear and refuse to act;
4. To fail to appear (f).

When an executor appears to the citation, and propounds the will himself, he becomes only nomi-

(a) *Mencies v. Pulbrook*, 2 Curt. 851.

(b) 1 Williams on Ex'ors (5th ed.), 244.

(c) *Jackson v. Whitehead*, 3 Phill. 577.

(e) Williams on Ex. (5th Ed.), 242.

(f) Coote & Tris. 3rd Ed. 217.

(d) *Ante*, p. 320.

nally the defendant in the suit, and will do the acts which ordinarily devolve on the plaintiff, *e. g.* deliver the declaration, &c. (a).

When the executor upon being cited fails to appear, or appears and refuses to act, the party entitled to the residue, or a legatee named in the will, or either of their representatives, may propound the will *in loco executoris* (b).

When the person entitled to the residue, or a legatee, may propound a will.

2nd. Parties who may be Defendants in a Suit of proving a Will in Solemn Form of Law.

Any party whose interest may be adversely affected by the will may be a defendant; and a possibility of interest is sufficient to entitle a party to appear in this character (c). But he must have a direct interest in the suit (d).

Parties who may be defendants.

Amongst the persons therefore who may appear as defendants will be included those who are entitled to put an executor on proof of a will, viz:—

1. The widow and next of kin of the deceased, and all other persons entitled in distribution to his personal estate, in the event of his dying intestate, or their representatives.

The widow and next of kin, &c.

2. A legatee named in the will in question, if his legacy has been omitted from the probate, or his representative.

Legatee in the will.

3. An executor or legatee named in any other testamentary instrument of the deceased, whose interest is adversely affected by the will in question, or their representatives.

An executor or legatee in any other will.

When an administration has been previously granted:—

Creditor in possession of administration.

4. A creditor in possession of administration.

(a) *Brandreth v. B.*, 2 Sw. & Tr. 446. (b) *Coote & Tr.*, 3rd Ed. 216.

(c) *Tui non interest* may be objected at any stage of the suit; *Wright v. Rutherford*, 2 Lee, 267.

(d) *Brotherton v. Hellier*, 1 Lee, 599.

An appointee
of the court.

5. A person in possession of administration under section 54, S. C. Act, as appointee of the court, without having a beneficial interest in the estate of the deceased.

The heir at
law.

6. When the will relates to real estate, the heir at law, devisee, or other persons pretending an interest in such real estate, are to be made defendants (a), unless the court (b) shall, with reference to the circumstances of the property of the deceased, or otherwise, think fit to direct that the cause may proceed without their being cited (b).

The heir-at-
law, &c., may
be cited.

They are made defendants by being cited by either party to the suit, to see proceedings in pursuance of an order obtained for that purpose on motion. But the Judge, before granting an order, must be satisfied by affidavit that the will in question affects, or purports to affect, the real estate of the testator, and he may then make any special directions as to the persons to be cited, which he may think the justice of the case requires.

The heir at-
law, &c., may
intervene.

The heir-at-law and other parties interested in the real estate affected by the will, though not cited, may become parties (defendants), and intervene with leave of the Judge obtained by order on summons for their respective interests in such real estate (c).

It was a rule of the Prerogative Court, that when a suit was pending, a party whose interest might by possibility be affected by the suit, should be allowed to intervene to protect his interest. He was called an intervener, and by C. Rule 4 *post*, that right was continued, subject to the same limitations, and to the same rules with respect to costs as theretofore, viz., as in the Prerogative Court (c).

(a) *Vide*, sec. 49, S. C. Act and C. R. rule 34, *post*.

(b) *Emberly v. Trevanion*, 29 L. J. 142.

(c) Sec. 49, S. C. Act.

The distinction between an intervener and a defendant properly so called, would seem to be this, viz., that an intervener is a person who puts in an appearance in a suit without being cited, and while the suit is pending. If he puts in an appearance in answer to a citation served upon him by the plaintiff, or at the commencement of the suit, he would be called a defendant, and not an intervener.

Distinction
between inter-
veners and
defendants.

It was the practice of the Prerogative Court that interveners should take the cause as they found it at the time of their intervention; hence they could, of right, do only what they might have done, had they been parties in the first instance, or had their intervention occurred at an earlier stage of the cause; therefore an intervener in a cause had no right when the cause was formally concluded by the publication of the evidence to plead in the principal cause, but the Court might allow an intervener to do so, *ex gratia*, if the cause at the time of this intervention was not actually and formally concluded (a).

A person desirous of intervening has but to enter an appearance and give notice of his appearance to the parties litigant. The proceedings are thenceforth intituled, A. v. B., C. intervening.

A minor (*i. e.* a person above the age of seven years and under the age of twenty-one) may elect a guardian for the purpose of carrying on, defending or intervening in a suit. An infant (*i. e.* a person under the age of seven years) would, by the E. C. P. practice, have a guardian assigned to him by the judge on affidavit (b).

Any person who is not worth £25 (c) after payment of his just debts, save and except his wearing

Forma
pauperis.

(a) *Clements v. Rhodes*, 3 Add. 40.

(b) See also p. 65, *ante*.

(c) In the Eccl. Courts the limit appears to have been £5. Coote, Eccl. Law, 80.

apparel, is allowed to sue (a) or prosecute (b) a suit *in forma pauperis* (c).

Any person desirous of prosecuting a suit *in forma pauperis* is to lay a case before counsel and obtain an opinion that he or she has reasonable grounds for proceeding (d).

"No person shall be admitted to prosecute a suit *in forma pauperis* without the order of the judge; and to obtain such order, the case laid before counsel, and his opinion thereon, with an affidavit of the party, or of his or her proctor, solicitor or attorney, that the said case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and an affidavit by the party applying that he or she is not worth £25, after payment of his or her just debts, save and except his or her wearing apparel, shall be produced at the time such application is made.

Where a pauper omits to proceed to trial, pursuant to notice, he or she may be called upon by summons to show cause why he or she should not pay costs, though he or she has not been dispaupered, and why all future proceedings should not be stayed until such costs are paid."

Although the language used here by Dr. Tristram, in stating the practice in suits in which minors and infants are parties, and in suits *in forma pauperis* is that of the rules of 1862, (e) the same practice appears to have been followed in the Prerogative Court in those matters; except that £5, instead of £25, appears to have been the limit for paupers (f).

(a) *Re Jones*, 1 Hagg, 81.

(b) *Cuthrell v. Jeffree*, 33 L. J. P. & M., 178.

(c) 11 Hen. VII., c. 12 and 23 Hen. VIII., c. 15. See also *Parr v. Montgomery*, 22 Gr. 176.

(d) As to dispauperizing, see *Lovekin v. Edwards*, 1 Phill. 183; *Lait v. Bailey*, 2 Rob. 150.

(e) *Vide* Coote & Tris. 6th Ed, 454.

(f) D. & B. 633 & *cas. cit.*

CONTENTIOUS BUSINESS.—PROCEDURE.

SECTION IV.

PROCEDURE.

Of the Commencement of a Suit.

A step frequently resorted to preliminary to com- *Caveats.*
mencing a suit, when a grant of probate or adminis-
tration or guardianship has not already passed, is
entering in the registry a caveat (a) against such
grant passing without notice being given to the
party who entered the caveat or to his proctor
or solicitor. (Sec. 47, S. C. Act.) This caveat
will remain in force for the space of three months
(S. C. R. 19) and then expire, but may be re-
newed from time to time, and so long as it re-
mains in force, no grant can pass without notice
being given to the party who lodged it or to his
proctor or solicitor, so as to give him an opportunity
of appearing and opposing the grant. The giving
of this notice is technically termed *warning* the
caveat (b).

The Form of Caveat in Contentious Business, E. C. P., did not set
forth the interest. It was as follows:—

CAVEAT (c).

In her Majesty's Court of, etc.

Let nothing be done in the goods of A. B., late of
deceased, who died on the day of at
unknown to C. D., of having interest [or to E. F.,
proctor, solicitor or attorney of parties having interest].

Dated this day of 18 .

(Signed) C. D., of [or E. F., of
the proctor, solicitor or attorney of parties having interest].

- (a) It is said that an act done pending caveat is void. (D. & B. 689).
(b) The warning of caveats is included in the definition of non-con-
tentious business, S. C. R. 1. See also S. C. R. 21 and 22.
(c) Coote & Tria. 3rd Ed. 363.

(See further as to Caveats—C. R. 5, 6, and S. C. R., 18-22, and ante chap. VIII. s. II.)

Warning of caveats.

The warning of a caveat is to state the name and interest of the party on whose behalf the same is issued; and if such person claims under a will or codicil, it is also to state the date of such will or codicil, and must be accompanied by an address within three miles of the General Post Office (according to E. C. P. practice), at which any notice requiring service may be left.

Appearance.

When the caveat has been warned, the party who lodged it may enter an appearance, and upon his having entered an appearance, the suit is said to be commenced.

The entry of an appearance to the warning of a caveat sets forth the interest in the effects of the deceased testator or intestate of the person on whose behalf such appearance is entered (C. R. 74, *post*).

Upon an appearance being entered in answer to the warning of a caveat, the matter is entered as a cause in the court book, and the contentious business shall thereupon be held to commence, (C. R. 6, *post*).

Citations.

Another mode of commencing a suit is by citation. This mode will be resorted to where an executor or person acting *loco executoris* proposes to prove a will in solemn form of law, and no caveat has been entered, or a caveat has been entered and no appearance given to the warning thereof. The contentious business shall be held to commence with the extracting of a citation in the Form No. I., or in some similar form. (C. Rule 7 *post*.) So, also, a party interested, who purposes to put an executor who has taken probate of a will in common form, on proof of the will *per testes*, or to call in a grant of administration that

When contentious business commences with.

the same may be revoked, would commence his suit by citation. (See Forms, Nos. II. and III.) (a)

No citation is to issue under seal until an affidavit in verification of the averments it contains has been filed in the registry. The affidavit should be made by the party, or one of the parties, on whose behalf it is extracted, and if he is the heir-at-law, it should recite briefly the order on motion.

An affidavit
requisite to
lead citations.

Before a citation is signed by the registrar (b), a caveat is entered against any grant being made in respect of the estate and effects of the deceased to which such citation relates. Such caveat is to be renewed from time to time, so as to be kept in force so long as the proceedings arising from the service of the citation are pending. This rule does not apply to citations to exhibit an inventory, and to render an account, nor to citations to show cause why a bond should not be assigned in order to its being enforced against the sureties.

Caveat to be
entered before
citations signed.

Citations to see proceedings may be extracted from the registry on the application of any party to the cause. (C. Rule 16.)

Citations to see
proceedings.

See further as to service of citations *ante* (b).

If the party cited be abroad having an agent resident in this Province, such agent must be served with a true copy of the citation.

Service on
agent in On-
tario (if any)
of party cited.

Of Personal Service of other Instruments.

The rules issued, so far as they relate to the service of citations, are to apply to the service of all other instruments requiring personal service.

(a) Before a citation can issue under S. C. Rule 17, the order of the judge is to be taken.

(b) *Vide ante* Ch. on Citations.

Of Appearance (a).

The party cited, or whose caveat is warned, should within the time named in the citation or in the warning, enter an appearance in the registry in a book provided for the purpose. * * * The entry must set forth the interest which the person on whose behalf it is entered has in the estate and effects of the deceased. (C. R. 74, *post*.)

The entry and the appearance of a party is also accompanied by the address of the party entering it or his attorney. (C. R. 10, *post*, and S. C. R. 23 *ante* (b).)

Of Proceedings in default of Appearance.

In case the party cited does not appear within the time limited in the citation, the cause proceeds by default. (C. R. 12, *post*.)

It will then be lawful for the plaintiff to proceed in default on filing in the registry an affidavit of *personal service* of the citation and of non-appearance, together with the citation, or where personal service has not been duly effected the order of the judge, founded on an affidavit, and giving leave to proceed, must have been obtained. (C. R. 8, *post*.)

(a) Any person served with a subpoena to bring in a testamentary paper was, under the E. C. P. Rules of 1862, at liberty to enter an appearance on payment of the usual fees, if he thought fit to do so. Coote & Tr., 5th Ed., pp. 191, 404.

(b) A corporation aggregate appears by a syndic appointed under its common seal (D. & B. 714, *Black v. Hodgson*, 5 No. Ca. 167.) By entering an absolute appearance the defendant admits the jurisdiction of the Court (*Bond v. Bond*, 2 Sw. & Tr. 93), and waives any irregularity in the citation, or in the copy, or in the service of it (D. & B. 715, and cases cited); but not a nullity (*Akerley v. Parkinson*, 3 M. & S. 411.)

Appearance
under protest.

Upon an appearance under protest the jurisdiction of the court (*Brown v. Coates*, 1 Add. 345, n.), or the capacity of the plaintiff to sue may be put in issue; in the same way the validity of the citation or of the service may be objected to, and it may be shewn that circumstances which do not amount to a legal bar to the suit render it unconscientious that it should be prosecuted in the particular case. (D. & B. 715.)

In case the citation has been advertised, the newspaper containing the advertisement, together with the citation and affidavit of non-appearance, must be filed in the registry (*a*).

The plaintiff should then file his declaration in the registry within eight days (by E. C. P. practice) from the last day allowed in the citation for the appearance of the defendant. (C. R. 16 *post*.)

At the time of filing his declaration, he should file *Scripts* therewith an affidavit of scripts. (C. R. 19, *post*.)

An application must be made on motion to the judge for his direction as to the mode of hearing the cause. (C. R. 25, *post*.)

There being no defendant, and therefore no issue, the cause will be directed to be heard before the court without the assistance of a jury.

A record, in Form No. xv., or as near thereto as can be, shall be deposited in the registry. (C. R. 28, *post*.)

Should the court at the hearing be satisfied, upon *Decree* the examination of one or more witnesses, that the will was duly executed, and that there is nothing to show that it was not the free act of a competent *Probate in solemn form* testator, it will decree probate of the instrument in solemn form.

But the party cited may enter an appearance at any *Appearance allowed* time before a proceeding has been taken in default, or afterwards by leave of the judge (1). * * *

(1) In the Prerogative Court proceedings in default were said to be in *pœnam contumaciæ*. A party in *pœnam* was, as in Chancery, allowed to appear at any time before sentence upon the same terms as an intervener: that is, he took the proceedings as he found them at the time of his appearance. A plaintiff may reasonably ask that terms of this character *Terms* should be imposed upon a defendant, who, after default, seeks leave to enter an appearance (D. & B. 757).

(*a*) In the Surrogate Courts, instead of filing the newspapers, the advertisement is clipped out, and the publication verified by affidavit, the advertisement being annexed.

Of Affidavits of Scripts after an entry of Appearance.

When pencil writing on script.

When any pencil writing appears on a will, script, or other document filed in the registry, a fac-simile copy of the will, script, or other document, or of the pages or sheets thereof, containing the pencil writing, is filed with those portions written in red ink which appear in pencil in the original. Such copy must be examined in the registry (a).

Particulars.

When necessary, the party propounding testamentary papers was ordered to furnish particulars of the papers to which the declaration was intended to apply (b).

Of Filing and Delivery of Declaration.

The party propounding the alleged last will and testament of the deceased is in all cases the proper party to deliver the declaration (a). In ordinary cases it belongs to the plaintiff to deliver the declaration, but in certain cases, *e. g.*, in suits for the revocation of probate, it is the duty of the defendant to do so (c).

The declaration is to be delivered to the opposite party, and a copy thereof filed in the registry on one and the same day, and within one month from the entry of appearance by the defendant; but the party whose duty it is to bring in the declaration shall not be compelled to deliver it, or to file a copy thereof, until the expiration of eight days after the other party has filed his affidavit as to scripts. (C. R. 14, 15 & 61, *post*).

Of Filing and Delivery of Pleas.

In ordinary cases it belongs to the defendant to

(a) Coote & Tr., 5th Ed. 253-4, & C. R. *post*.

(b) *Marsh v. Corry*, 3 Sw. & Tr. 460 (1860).

(c) See C. R. 14, 15, 75, *post*.

deliver the plea, but in certain cases, *e. g.*, in suits for the revocation of probate, it belongs to the plaintiff.

A party desirous of pleading must deliver his plea to the other party within eight days after the service of the declaration, and file a copy thereof in the registry on one and the same day, otherwise he will not be admitted to plead except with the permission of the judge, * * * (C. R. 17, *post*).

The pleas to be filed depend on the circumstances of each case. There are various pleas, *e. g.*, denying that the will is the will of the deceased; denying the due execution of the will; denying the testamentary capacity of the deceased, or alleging that the making of the will was procured by undue influence or by the fraud (a) of some person or persons named. Pleas.

Of Filing and Delivery of Demurrers, Replications and further Pleadings.

Either of the parties may, within eight days of the service upon him of the last previous pleading, give in a replication, rejoinder, surrejoinder, rebutter, or demurrer, as he may be advised. The form of the declaration and plea will, it is presumed, be a sufficient guide as to the form of any further pleadings —(Coote & Tr., 5th Ed. 257, 456.)

Of obtaining Leave for further Time to Declare or Plead, &c. (b).

If a party in any cause fail to deliver, or file a copy of the declaration, plea or other pleading within the time specified in these rules, or within such extended time as may have been allowed, the party to whom such declaration, plea or other plead-

(a) *Vide infra*, Pleading.

(b) See C. R. 52 *post*.

ing ought to have been delivered shall not be bound to receive it, and the copy of such declaration, plea or other pleading shall not be filed, unless by direction of the judge, obtained on summons. The expense of every application for such direction or order shall fall on the party who has caused the delay, unless the judge or registrars shall otherwise direct—(C R. 37, *post*).

Power of judge to extend time for delivering pleadings, &c.

But the judge in every case in which a time is fixed by the rules for the performance of any act has power to extend the same to such time, and with such qualifications and restrictions, and on such terms, as to him may seem fit (a). In order to prevent the time limited for bringing in the declarations, pleas and other pleadings, from expiring before application can be made to the judge for an extension thereof, a registrar of the English Court of Probate might, upon reasonable cause being shown, extend the time for bringing in such declaration, plea or other pleading or proceeding, provided that such time shall in no case be extended beyond the day upon which the judge shall next sit in open Court or in Chambers (b).

Of Amendment of Pleadings before Trial.

Amendments.

If the plaintiff or defendant is advised that the declaration, or plea, or subsequent pleading, does not disclose sufficient to enable him to proceed to trial in safety, he should apply to the Court upon motion for leave to amend his pleading (c).

If the application is vexatious, the Court will refuse it, but where it is made with *bona fides* the Court will grant it, subject to such terms as it may approve (d).

(a) C. R. 52 *post*.

(b) C. R. 58 *post*.

(c) C. Rules, 20 and 21, *post*.

(d) *Ware v. Olaxton*, 1 Sw. & Tr. 251.

But if the alteration or amendment required be merely verbal, or in the nature of a clerical error, it may be made by order upon summons.

Where a party has obtained, on summons by consent, leave for further time to plead, he is taken to have waived all technical objections to the form of the plea which has been filed by the opposite party (a).

When a pleading had been ordered to be altered or amended, the time for filing the next pleading commenced from the time of the order having been complied with (b).

As to Amendment at the Trial.

On an application for leave to amend at the trial, the inclination of the Court will be to grant such application, rather than shut out any defence which might be raised. Thus, in *Todd v. Sumpson* (c), in which the plaintiffs in their declaration had propounded a will in solemn form, and the defendants in their plea alleged, *first*, that the will was not the will of the deceased; *secondly*, that it had not been duly executed according to the Wills' Act; and *thirdly*, that, at the time of its execution, the deceased was not of sound mind, counsel for the defendants during the trial applied for leave to amend their pleas by adding a *fourth* plea, viz., that the making of the said will was procured by the undue influence of Todd (the plaintiff) and others acting with her, Sir C. Cresswell said: that "he was disposed to allow the amendment, so as to enable the defendants to raise every possible defence; but that if he allowed this plea to be put on

On terms.

(a) Coote 4th Ed. 242.

(b) Coote & Tr., 4th Ed., p. 242.

(c) 1 Sw. & Tr. 269 (1859); and see also *White v. White*, 2 Sw. & Tr. 504 (1862); *Ware v. Claxton*, ante.

the record, he should only do so subject to a rehearing, if required by the plaintiffs, and that he would then discharge the jury, so as to give the plaintiffs time to prepare a defence against this new plea; and for this indulgence asked on their part the defendants must pay all the expenses of the postponement of the trial" (a).

SECTION V.

PLEADING.

Where two wills are propounded.

If one party propound a will in his declaration, and the other party in his plea allege the existence of another will, each party may, with and subject to the permission of the judge, adduce proof at the trial or hearing of the cause of the validity of the will upon which he relies (C. R. 18, *post*).

Notice by defendant as to cross-examination of witnesses.

In all cases the party opposing a will may, with his plea, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Prerogative Court (C. R. 76, *post*).

The form of pleading, adopted in the English Court of Probate, was similar to that in the Common Law Courts (b).

Irrelevancy.

Where pleadings contain irrelevant matter, application should be made in Chambers to have it struck out (c).

(a) See A. J. Act. R. S. O. c. 49, s. 8, as to general powers of amendment. (b) *Leake v. Hurst*, 30 L. J. (P. & M.) 39 (1860).

(c) *Farler v. Farler*, 27 L. J. (P. & M.) 103; *Rosbotham v. R.*, 2 Sw. & Tr. 121.

That which assisted the Court to arrive at a true conclusion in relation to a testator's mental capacity was not considered irrelevant when pleaded; as where a widow in opposition to a will sets up habitual intoxication and weakened capacity and custody, she may also plead insane dislike on the part of her husband, to account for their living apart, though the delusion may not be sufficient *per se* to invalidate the will (a).

A defendant can only set up another will in his plea to the one propounded, under a special rule (b). Immaterial
pleas.

The plaintiff propounded a will, dated 3rd March, 1862; the defendant pleaded,—first, undue execution; secondly, that subsequently to the alleged execution of the said will, the testator duly executed a will on 29th March, 1864; thirdly, that the will propounded, howsoever executed, was duly revoked by, and by virtue of, the will of 29th March, 1864; fourthly, that the will of 29th March, 1864, was subsequently to its execution, destroyed by the deceased, with the intention of revoking the same. Objections being taken to these pleas the Court held the second and fourth pleas bad, as neither showed that the will propounded was not entitled to probate; that the pleadings should be amended by inserting the word “and” between the second and third pleas, so as to make them form one plea; the words, “howsoever executed” being struck out of the third plea (c).

A will being propounded by executors the defendants pleaded—(1) undue execution; (2) that on the date of the will the deceased was not of sound mind, etc.; and (3) ignorance and non-approval of the contents, (d) with particulars as to this plea and notice

(a) *Reay v. Coucher*, 1 Hagg. 75.

(b) *Powell v. Powell*, 35 L. J. P. & M. 5 (1865). (c) *Ib.*

(d) See also *Butlin v. Barry*, 1 Curt. 614, and 2 Moo. P. C. 480; and *Hastlow v. Stobie*, 35 L. J. P. & M. 18.

that he merely insisted upon the will being proved in solemn form of law, and that if both attesting witnesses were produced by plaintiffs in support thereof, he only intended to cross-examine them. A motion to strike out the third plea, or the notice was rejected with costs, as knowledge and approval of the contents of a will are part of the burden of proof assumed by the person who propounds it (a). Referring to authorities in the Prerogative Court and also to *Sutton v. Sadler*, ante.

Interest cause. In an interest cause, instituted by the Queen's Proctor, who alleged that the deceased died a widow, without lawful issue, intestate and illegitimate; the defendant, who claimed as nephew, pleaded that deceased was not illegitimate; that she was the legitimate child of S. W. and Mary, his wife; that S. W. and Mary, his wife, had one other lawful child, of whom the defendant was the lawful child. Held, that the plea was sufficient, and that it was not necessary that the time and place of the birth of the deceased's parents should be alleged (b).

Particularity, sufficient. A plea to a declaration, propounding a will of A., and stating only that it "was after the execution thereof, revoked by another will duly executed by the said A.," is bad on demurrer, on the ground that a will relied upon as revoking a former will, should be pleaded with the same circumstantiality as to the time when made, and its due execution, as if it had been propounded; and that the plea need not set out the will to show their inconsistency (c).

When a will, which has been destroyed, is propounded, it is not necessary to set out its contents or the circumstances of its destruction, but its date

(a) *Cleare v. Cleare*, 1 P. & D. 655.

(b) *Queen's Proc. v. Williams*, 31 L. J. P. & M. 90; see, also, *Queen's Proc. v. Wallis*, *Ib.* 97.

(c) *Leake v. Hurst*, *supra*.

must, if possible, be declared. The declaration should state all particulars within the knowledge of the party, so as to enable the defendant to plead specifically to some particular will (a).

Where it is intended to invalidate a will on the ^{Fraud.} ground of fraud, or of circumstances, tantamount to a charge of fraud, there should be a plea on the record, alleging that the execution of the will has been obtained by fraud; a plea of undue influence is insufficient to let in a charge of fraud against the party propounding the will. Here an amendment was permitted, subject to an adjournment and costs, and the charge was withdrawn (b).

A plea of undue influence, or other influence, exercised over a testator, as intimidation, duress, or improper control, is bad unless it contain the name of some person who exercised such undue influence. ^{Undue influence.} ^{Vagueness.} (c).

To a declaration, propounding a will, the defendant pleaded—(1) that at the time of the pretended execution of the will, the deceased was incapable of executing it; (2) that the will was prepared and made by A., and that the deceased had not given A. directions to prepare or make it. Held, on demurrer, that both pleas were bad (d).

Under a plea that a paper propounded "is not the will of the deceased," evidence of undue execution or incapacity, is not admissible; the meaning of this plea is, that the deceased did not execute the paper intending that it should operate as his will. An issue being joined on this plea, the verdict might be ^{"Not the will of deceased" bad for ambiguity.}

(a) *Glen v. Burgess*, 3 Sw. & Tr. 43.

(b) *White v. White*, 2 Sw. & Tr. 504.

(c) *Harris v. Bradbury*, 30 L. J. P. M. & A. 168; *West v. West*, 34 L. J. P. & M. 146.

(d) *Middlehurst v. Johnson*, 30 L. J. P. M. & A. 14; and see *Hastlow v. Stobie*, 35 L. J. P. & M. 18.

for the defendant, and yet be no answer to the declaration (a).

Where the executors of a will having called in the probate of a will of prior date, propounded in a declaration the later will, it is not competent to them to allege in their declaration that the probate of the earlier will was surreptitiously obtained, or that the earlier will ought to be pronounced null and invalid (b).

Omission of material fact.

A declaration, omitting to state that the will of a foreigner, depending on due execution according to the law of domicil, therein propounded was valid according to the law of his domicil, was held bad on demurrer, leave being given to amend on payment of the cost of the demurrer (c).

General plea, where allowed.

In *Brown v. Thomas* (d), where the question was as to the revocation (under the Wills Act) of a will by subsequent marriage, it was held that the party might plead the marriage *generally*, in order to obtain the answer of the opposite party as to the fact, it being peculiarly within her knowledge.

Interest.

A party in possession of administration is not bound to propound his interest till the party calling it in question has established his own (e).

Want of interest.

Want of interest might be objected at any time in a cause, especially before issue joined (f).

Admission of interest.

An admission of interest in the party opposing a will by the party propounding it, may not be retracted (g).

Of the Delivery of the Issue].—See C. Rule 22, *post*.

(a) *Cuntiffe v. Cross*, 32 L. J. P. & M. 68; and see *Owen v. Davis*, 3 Sw. & Tr. 588, and 33 L. J. P. M. & A. 201.

(b) *Rosbotham v. R.*, *supra*.

(c) *Isherwood v. Cheetham*, 31 L. J. P. M. & A. 99; 2 Sw. & Tr. 607.

(d) 1 Spink, 29.

(e) *Hibben v. Callemberg*, 1 Phill. 166.

(f) *Wright v. Rutherford*, 2 Lee, 266.

(g) *Panchard v. Weger*, 1 Phill. 212; *Inkson v. Jeeves*, 32 L. J. P. M. & A. 69.

SECTION VI.

TRIAL AND OTHER PROCEEDINGS.

Of Motion for the Directions of the Court as to the Mode of Trial.] See Rules 23 and 24 (1857) *post*.

*Of the Mode of Trial.]—*See Rule 25 (1857) *post*.

Questions of law will be directed to be tried before the Court without the assistance of a jury. Questions of fact may be directed to be tried either before the Court itself without the assistance of a jury, or to be tried by a jury. Where issues of law and fact are raised on the pleadings, the Court has power to direct the issues of fact to be tried by a jury, reserving the issues of law to be tried by itself alone (a).

Issues of law
and fact.

An heir-at-law, who is party to the cause, upon making application to the Court for that purpose, has a right to have questions of fact tried by a jury.

In other cases it is within the discretion of the Court to direct questions of fact to be tried with or without a jury (b). But where the issues raised are testamentary capacity, undue influence, or fraud, it is the practice of the Court on application made by either party to grant a jury. And where any of the parties to a suit, other than the heir-at-law, apply for a jury, and the Court refuse one, such refusal is, with the leave of the Court, subject to an appeal. (Sec. 31 S. C. Act.)

The Court of Probate, however, unless reason were shown on affidavit (c) to the contrary, was held to be the Court in which the cause ought to be tried. The power of the Judge to direct an issue is discretionary, and to be exercised only where it would be a discreet exercise of such power (d).

(a) *Orispin v. Doglioni*, 1 Sw. & Tr. 493. (b) Sec. 18, S. C. Act.

(c) *Brandreth v. B.* 2 Sw. & Tr. 446. & *Coo. & Tr.* 3rd Ed. 228.

(d) *Cooper v. Moss*, 1 Sw. & Tr. 143. The Court has refused to

Of the Record.—*Vide* C. Rule 26, *post*.

Issue.

If the cause be directed to be tried by a jury, the questions at issue between the parties are to be prepared by the party declaring from the record, and settled by the Judge in Chambers. A form is given, No. XV., and a copy of such questions so settled is to be served on all the other parties to the cause.

After the questions have been so settled, any party in the cause shall be at liberty to apply to the Judge on summons to alter or amend the same, and his decision shall be final and binding on the parties.

Where the Judge directs an issue, the plaintiff should prepare the issue, and submit it to the defendant.

Of setting the Cause down for Trial.—*Vide* C. R. 27 *post*.

Setting down Demurrers.

Demurrers are set down for hearing in the same manner as causes, and will come on in their turn with other causes to be heard by the Judge without a jury. (C. Rule 56.)

Power to examine witnesses,

Of the Power of the Court to summon a Jury.

—See secs. 18 & 19 S. C. Act, *ante*.

and to enforce orders.

Of the Powers of the Court to examine and enforce the Attendance of Witnesses and the Production of Deeds, &c.

See secs. 21 & 22 S. C. Act, and *Skipper v. Bodkin*, 8 W. R. 589, and 2 Sw. & Tr. 1. The Court may enforce its orders

direct an issue where the cause had excited considerable discussion and feeling in the county where it was proposed to be tried (*Id*); also where there was a probability of the cause being made a remanet at the ensuing assizes. And where, upon the motion of the defendant, an issue was directed to be tried at the summer assizes to be holden at Norwich in 1858, and through the defendant's default it did not come on for trial, the Court, upon application made by the plaintiff (the defendant opposing), directed the cause to be tried in the Court of Probate. (*Esling v. Dixon*) (*a*).

(*a*) *Vide* Coote, 4th ed. 246; *ante* p. 27.

by process of contempt and by sequestration. See Daniell's Ch. Prac., ch. xxiv., ss. 6 & 7.; Smith's Ch. Prac. 112 (6th ed.); *Bayley v. Bayley*, 20 L. J. 72; *Baker v. Baker*, 2 Sw. & Tr. 390. A married woman may be attached for non-compliance with any order of Court, excepting an order for payment of costs, where she has no separate estate: *Harris v. Bradbury*, 2 Sw. & Tr. 459.

Of Orders by the Judge for the Production of any Papers purporting to be Testamentary.—See sec. 22 S. C. Act, and C. R. 31 *post*, and pp. 29, 116, *ante*. Order to produce any instrument purporting to be testamentary.

Of Subpœna to Witnesses.—See C. Rule 29 *post*.

Of Notice to admit Document.—See C. Rule 30 *post*.

Of the Time for Trial.—See C. R. 56, *post*.

Of the Trial.—See C. R. 32. *post*. Where an executor propounds a will in solemn form, and there are several defendants whose case on the pleadings is substantially the same, the Court will hear counsel only for one defendant (a).

Of Evidence.—As to the rules of evidence. *Vide* sec. 27, S. C. Act *ante*.

Of the Mode of taking Evidence in Contentious Matters.—*Vide* sec 24 S. C. Act.

Of the Requisites for Affidavits, Formalities, &c.—These are the same as in affidavits in common form business.

Of Commissions or Orders for Examination of Witnesses Abroad, or who are unable to attend.—Where a witness in any matter is out of the jurisdiction of the Court, or where by reason of his illness or otherwise the Court shall not think fit to enforce the attendance of the witness in open Court, it shall be lawful for the Court to order a commission to issue for the examination of such witness on oath upon interrogation or otherwise before any officer of

(a) *Palmer v. McLean*, 1 Sw. & Tr. 149.

the said Court, or other person to be named in such order for the purpose (a).

Service of Order.—A copy of the order is served on the opposite attorney. The order itself should be delivered to the examiner.

Of the Jurisdiction of the Court on Trials before a Jury.—See secs. 18 and 19 S. C. Act.

Compromise.—When a compromise has been effected, it is most convenient to recite the terms of the compromise in the decree (b).

Of the Entry on the Record of the Finding of the Jury, or of the Decision of the Judge.—See C. R. 33, *post*.

Applications for New Trials in causes tried before a Jury.—See sec. 15 S. C. A., *ante*; and see C. R. 35 *post*, and *Young v. Dendy*, 36 L. J. (P. M. & A.) 43.

Applications for rehearing a Cause tried before the Judge without a Jury.—See C. R. 36, *post*, and *Sugden v. Lord St. Leonards*, *Infra*.

Appeals.—See sec. 31, S. C. Act, & *ante*, p. 84.

Of the Decree whilst the Appeal is pending.—Parties might proceed to carry into effect the decision of the Court of Probate, notwithstanding any notice of appeal, or for application for leave to appeal, unless the judge should otherwise order; and the judge might order the execution of his decree or order to be suspended, upon such terms as he saw fit. (Rule. C. R. 50 & 51, *post*.)

Of Administration pendente Lite.—*Vide ante* sec. 51 S. C. Act, and p. 263.

Of Accounts of Administrators pending Suit.—By Rule 96 E. C. P. of 1862, every administrator

(a) See 25 S. C. Act, and see sec. 26 as to powers of Court for enforcing examinations.

(b) *Harvey v. Allen*, 1 Sw. & Tr. 151.

pendente lite was required to exhibit an inventory, and render an account of the property of the deceased which came to his hands, and the accounts of every such administrator were referred to the Registrars for investigation and report, before the same were allowed by the Court unless the judge should otherwise direct.

See also Ch. on "Inventory and Account," and *Beatty v. Haldan*, *ante*.

Of the granting of Probate in Common Form after the Termination of Suit.

When the Court has pronounced for the validity of the will, the executor may take probate of it in common form. He will be required to make the ordinary affidavits as to the due performance of his office, &c., and the amount of property.

SECTION VII.

OF INTEREST CAUSES.

Interest causes are administration suits in which the right of a person applying for a grant of administration is contested, either on the ground of his having no interest, or that his interest does not entitle him to the grant, or that for some cause he is incapacitated from receiving the grant, or is an undesirable person to receive it (*a*).

In interest causes in the E. C. Probate, as in the Prerogative Court, each party was at liberty to deny the interest of the other; and in such cases both parties might, with and subject to the permission of the judge, adduce proof on one and the same trial of their interest respectively. (Rule 42, 1857, *post*.)

(*a*) The next of kin may contest administration with the widow. *Atkinson v. Lady Ann Barnard ante*.

**Interest
causes.**

In interest causes the pleading of each party must show on the face of it that no other person exists having an interest superior to that of the claimant. (Rule 43, 1857, *post.*) For example, that the deceased died a widower, without child, parent, brother, or sister, uncle or aunt, nephew or niece, leaving the claimant, the lawful cousin german, and one of his next of kin (*a*). Greater particularity than this is not required, except when the Crown claims administration on the ground that the deceased was illegitimate.

To narrow the issue, and so to save expense, the parties should set forth in their pleadings the pedigree they intend to rely upon in support of their respective interests. And where both cases are disclosed on the pleadings, it is advisable that each party should admit so much of the other's case (the whole if he may) consistently with and without prejudice to his own case; since such a course will often save expense, and the sooner enable the court to arrive at the justice of the case (*b*).

A plea of legitimacy in answer to a declaration of bastardy should set out the steps of the pedigree, showing that the deceased and claimant were descended from a common ancestor, but it is not requisite that the time or place of marriage, or the name of the wife, or the date of the birth of any of the parties in the pedigree should be stated (*c*).

It was the practice in the Prerogative Court for the parties to propound their respective interests in allegations; these allegations were exchanged (for a party had no right to see the adverse plea till he had set out his own pedigree (*d*), and they then proceeded

(a) *Dyke v. Williams*, 2 Sw. & Tr. 465, and *vide infra*.

(b) *Lawrence v. Maud*, 1 Add. 334.

(c) *Rutherford v. Maule*, 4 Hagg. 238.

pari passu, even where the alleged next of kin were in different degrees of relationship. But where an administration had been fairly and regularly taken, the administrator in such case was not bound even to propound (a) his interest till that of the party questioning it had first been both propounded and proved (b).

The rules already given with regard to pleadings, &c., in treating of the procedure in a suit proving a will in solemn form, are generally applicable to interest causes.

Where the Crown is concerned, and it is declared on its behalf that the deceased was a bastard, a person who claims to be an ascendant or collateral relative is bound to set forth his pedigree; but it is sufficient to aver that B was the legitimate child of A and his lawful wife, without stating the time or place of the marriage or the name of the wife, or the date of the birth of B. (c). The following is the form of the plea in *Dyke v. Williams*, which, on motion, and on looking at the Forms of Declaration and Plea in an interest cause, given among the forms of 1857, for contentious business, was held to be sufficient:—(d)

Where the Crown is concerned.

Pedigree to be set forth.

1. That Mary E., &c., was not a bastard.
2. That the said Mary E. was the legitimate child of Samuel Williams and Mary, his wife.
3. That the last mentioned Samuel Williams and Mary, his wife, had issue one other lawful child only, namely : Samuel Williams who died in the lifetime of the said Mary E., to wit, on the — day of —, leaving him surviving the said Samuel Williams the defendant, Elizabeth Gotz, wife of — Gotz, Abraham Williams and Joseph Williams, his natural and lawful and only children and only next of kin.

(a) *Hibben v. Calemberg*, 1 Lee, 658; *Dabbs v. Chaisman*, 1 Phill. 155.

(b) *Thomas v. Maud*, 1 Add. 482.

(c) *Dyke v. Williams*, *supra*. And *vide* p. 220-1, *ante*.

(d) *Per* Sir C. Cresswell in that case; See also 2 Sw. & Tr. 469; *Elme v. De Costa*, 1 Phill. 173; *Dabbs v. Chisman*, *supra*, and D. & B. 727.

The Attorney-General has no privilege in the matters mentioned that is not common to every suitor; and a pleading which would be a sufficient answer to the declaration of any other suitor will be a sufficient answer to his (a).

Rule as to
costs.

In interest causes costs generally follow, where the person whose interest has been denied succeeds in establishing it, almost of course without some special ground of exception to the rule (b).

SECTION VIII.

SUITS FOR REVOCATION OF GRANTS (c).

Suits for the revocation of a probate or of an administration with the will annexed are suits wherein the executor or person who has obtained probate or letters of administration with the will annexed in common form is put upon proof of the same in solemn form. They are substantially suits for proving wills in solemn form.

So also suits for the revocation of letters of administration simply are substantially interest causes.

The only difference between suits for revocation of probates and letters of administration, and suits for obtaining probate in solemn form, and interest causes, is in the form of the commencement of the suit.

The party calling in the probate or letters of administration, and who is nominally the plaintiff in the suit, commences proceedings by citing the party who obtained the grant to bring the probate or letters of administration into the registry within a cer-

(a) *Ibid.*

(b) *Northey v. Cock*, 2 Add. 294.

(c) See Secs. 14 & 56, S. C. Act, and Ch. on Revocation, &c. *ante*, and Coote & Tria. 5th Ed. p. 296.

tain time. The party cited (who becomes nominally the defendant in the suit) should, after he has brought in the grant, and within one month after he has entered an appearance, file a declaration propounding the will (where the grant was of a probate of a will or of letters of administration with the will annexed), or propounding his interest, as in an interest cause, where the grant was one of letters of administration simply.

The party proceeding for a revocation of the grant should file a plea in answer thereto, and the cause will proceed according to the rules already laid down for suits proving wills in solemn form and interest causes.

SECTION IX.

SUIT FOR INVENTORY AND ACCOUNT (a).

The suit for an inventory and account, and proceedings by act on petition, in use before the establishment of the Court of Probate in England, were retained by that Court with scarcely any variation (b).

By the tenor of his oath, every executor and administrator engages to exhibit an inventory, and render an account of his administration whenever required by law so to do; and one of the conditions of the administration bond is that the administrator shall make, or cause to be made, a true and perfect inventory, and the same so made shall exhibit, or cause to be exhibited, into the registry from whence the grant was made, whenever required by law so to do, of all and singular the personal estate and effects of the deceased, which have or shall come into his

(a) And see ch. on Inventory and account, *ante*.

(b) D. & B. 12, 663, 778. See also ch. ix. *ante*, and Williams on Ex'ors. 6th Ed. pp. 119, 1901.

hands, possession or knowledge, or into the hands or possession of any other person or persons for him; and further, shall make or cause to be made a true and just account of his administration whenever required by law so to do. It is a matter of duty, therefore, for an executor or administrator to deliver an inventory and account when properly called upon for that purpose; and it is always most prudent for him to do so before a final settlement, in order to exonerate himself from all liabilities (a). The obligation extends not only to executors and general administrators, but also to persons to whom limited grants have been made (b),—during minority (c), during absence (d), and upon a reasonable presumption being raised that any part of the effects of the first testator have travelled into their hands,—to the representatives of a deceased executor or administrator (e).

SECTION X.

SUITS RESPECTING GUARDIANSHIP OF INFANTS.

When a caveat is lodged against the grant of letters of guardianship, the practice in respect to it is, to conform as nearly as may be to the practice in the case of caveats against the grant of administration (Gdn. Rule, 4); and generally the practice and procedure, except where otherwise provided by rules, or orders under the S. C. Act, is to conform, as nearly as the circumstances of the case will admit, to the practice and procedure prescribed by the Act (f).

(a) *Kenny v. Jackson*, 1 Hagg. 105.

(b) *Brotherton v. Hillier*, 2 Lee, 131.

(c) *Taylor v. Newton*, 1 Lee, 15.

(d) *Bailey v. Bristowe*, 7 N. C. 387; 2 Rob. 145.

(e) *Ritchie v. Rees*, 1 Add. 144.

(f) *Vide* Ch. on Guardians, *ante*, and D. & B. 662.

SECTION XI.

MOTIONS (a).

In contentious business the question at issue may be brought before the Court for its decision, either on motion or by petition, as well as by the more formal proceeding of a regular suit.

Motions are often made *ex parte*.

Ex parte
motions.

The opinion of the Court in reference to the granting of probate, administration, or guardianship, is constantly taken upon motions made *ex parte*, without a citation being extracted and served upon, or an appearance entered or opposition made by parties interested.

The matter then comes under the class of non-contentious business.

But contentious business may be, and frequently is, brought before the Court on motion.

1. When a party making a motion gives notice of it to a person interested, and such person opposes the motion. Motions in
contentious
business.

2. When a motion is made and a party interested in it, though he has not had notice of it, appears in opposition to it.

3. When it is necessary to take the opinion or directions of the Court in reference to any step or matter interlocutory arising in a suit.

The following are the regulations to be observed according to the E. C. P. practice in bringing a motion before the Court:—

There should be lodged in the registry before two o'clock p.m., on the fourth day before the motion is to be heard, *exclusive of Sundays*—

1. A motion paper containing a short outline of the principal facts upon which the motion is grounded, and concluding with the terms in which the motion is to be made.

This statement should comprise no facts which are not supported by affidavit.

2. An affidavit or affidavits of the facts to be brought under the notice of the Court in support of the motion.

If an appearance has been entered by the defendants, or if a party interested, with or without notice of the intended application, has intimated his intention of opposing it, notice of the time and form of the motion, with copies of the affidavits filed in support of it, should be delivered to him. It is competent to him, either before or after their delivery, to file counter-affidavits. If copies of the affidavits have not been delivered to him, or not delivered to him in time to enable him to prepare counter-affidavits in answer to them, the Court will, on his application, when the motion is called, adjourn it in order to give him time to file counter-affidavits.

SECTION XII.

OF PROCEEDINGS BY PETITION.

Petition.

Contentious business may in some cases be brought before the court by petition.

This is a summary mode of proceeding, and was resorted to in the Prerogative Court for the adjudication of any incidental subject, which might arise during or after the progress of the suit, such as the taxation of costs between party and party; or on a

preliminary matter, such as a question of domicile ; or on an appearance under protest to the jurisdiction of the Court (a).

It was not, however, resorted to in the Prerogative Court, except with the consent of both parties to the suit. It was always competent to either party to insist upon the question raised being heard by plea and proof.

Questions to be Heard on Petition.

By C. R. 45 *post*, any question arising in a cause, and not being one of interest, domicile or other matter usually brought before the Court by declaration and plea may be brought before the Court by petition.

This mode of proceeding is very simple, and consists of short statements of the cases respectively relied on by the contending parties, supported by affidavits.

A case may be brought before the Court by petition at the instance of the plaintiff or the defendant (b).

For other steps in proceeding by petition, *vide* C. Rules, 45 to 48 *post*.

A form of petition is given No. 28.

The deponent in every affidavit, on the application of the opposite party, is subject to be cross-examined by or on behalf of such party in open Court, and after such cross-examination to be re-examined by or on behalf of the party by whom such affidavit was filed (c).

Cross-examination on affidavit.

After the time for filing the affidavits and other

(a) See 3 Burn's Eccl. Law, 202.

(b) See C. Rule, 62 *post*.

(c) S. C. Act, sec. 24.

proofs has expired, the petitioner is to set down the petition for hearing in the same manner as a pause.

Of Summonses.

As to summonses, *vide* C. R., 65 to 73 *post*.

Abatement.

Abatement. Upon the death of either party to the suit a suggestion must be entered on the record, or in the pleadings, if before the record is made up, and the suit revived and carried on in the name of the legal personal representative of the deceased party, (a).

Stay of Proceedings.

The Court suspended proceedings as to the validity of a will until it should be pronounced valid or invalid by the law of France, the deceased having been at the time of his death a domiciled subject of that country (b).

Proxies.

A proxy is the warrant of the practitioner which confers upon him authority to represent his client in the suit. They were required by the practice of the Prerogative Court, and there would seem to be no room for doubt that it is competent to the judge to call for the exhibition of a proxy whenever the course of justice may require it. It was essential

(a) *Staines v. Stewart*, 31 L. J. P. M. & A. 10; 2 Sw. & Tr. 326, and *Jones v. Jones*, 36 L. J. P. & M. 43. And see A. J. Act, R. S. O., c. 49, s. 9, as to power of judge in case of the decease of parties interested in suits, &c. And see D. & B. 610., and 2 Lee 369; Harrison's C. L. P. Act, 3rd Ed. 189, & *cas. cit.* & R. S. O. p. 659.

(b) *DeBonneval v. DeBonneval*, 1 Curt. 856; see also *Hare v. Nesmith*, 2 Add. 35, and *Bremer v. Freeman*, 1 Deane & Sw. 192.

only to secure the adverse party and to protect the proctor. No form was prescribed; but it was usually a written paper, signed and sealed and attested by two witnesses. It was sufficient, however, if the party, or some other in his name, offered to the judge a letter or other writing by which it appeared whom he had chosen for his proctor. The authority ceased upon the delivery of a final sentence (a).

SECTION XIII.

COSTS IN CONTENTIOUS BUSINESS, AND PRINCIPLES ON WHICH ALLOWED.

Costs are in the discretion of the Court, and not matter of strict law. This expression, however, must not be understood to mean that it is in the power of the judge to give or withhold costs as he pleases; but that they are in his legal discretion, adhering to general rules and former precedents. In fact, the award of costs is but practice (b).

Certain general principles governing the question of costs, and the liability of persons to costs, in contentious proceedings, which had prevailed in the Ecclesiastical Courts, were continued in the English Court of Probate under the Act of 1857, and General Rules 2, 3, and 4, (C. R.) *post q. v.*

The principles embraced in those rules, relate to:—

- (1) Executors, or other parties, proving wills in solemn form of law.
- (2) Compulsory proceedings at the instance of

(a) D. & B., 626-9, and notes.

(b) *Ib.* 801, & *cas. cit.*

next of kin and others for proof of wills in solemn form.

(3) Interveners.

Intervention. *Intervention* is the voluntary interposition of any person in a suit depending between others, with a view to the protection of his own interest. A person cited to see proceedings is not bound to appear; if he do so, therefore, though in form a party, in substance he is an intervener (a).

If a person be aware of the pendency of a suit, it is not only his right, but his duty to intervene, if he mean not to abide by the decision (b).

An executor proving a will in solemn form is entitled to take his costs out of the estate.

An executor who proves a will in solemn form, whether he has done so of his own motion, or has been put on proof of the will by parties interested, is entitled to have his costs out of the estate. It is unnecessary for him to make any application to the Court for them: indeed it is not advisable for him to do so; he has a right to take them out of the estate without an order of the Court. This right would seem to flow as a consequence from the ancient rule, that all the expenses incidental to proving a will are a charge upon the estate of the testator, and that the party who takes probate is entitled to recoup himself out of the estate for the costs he may have incurred in obtaining such probate (c).

Legatee on proving a will in solemn form entitled to costs out of the estate.

A residuary or other legatee who propounds a will in solemn form *loco executoris*, and obtains a decree in favour of such will, is entitled to have his costs also out of the estate (d). But he has not, like an executor, an *ex officio* right to take them, unless he becomes administrator *cum testamento annexo*. For when the Court pronounces for a will propounded by an executor, the executor will take

(a) D. & B. 616.

(b) *Newell v. Weeks*, 2 Phill. 224.

(c) *Cooté & Tristram*, 4th Ed, 262.

(d) *Williams v. Goude*, 1 Hagg. 610, *Thorne v. Rooke*, 2. Curt. 831; *Sutton v. Drax*, 2 Phill. 323, & *Cross v. C.* 33 L. J. P. & M. 39.

probate of it and he put in possession of the fund, out of which he may recoup himself for the expenses he has incurred in the suit. Whereas when the Court pronounces for a will propounded by a legatee, it does not follow of necessity that it will decree letters of administration with the will annexed to such legatee.

Application should be made upon the Court pronouncing for the validity of the will, that the decree may include an order for the costs of the legatee to be paid out of the estate (a).

A nude executor, who, without reasonable ground propounds a testamentary paper, is liable for costs; an executor, if he has any doubt as to the validity of a testamentary paper, should before propounding it, take security for his costs from the persons interested (b). Nude executor.
Security to executor.

When an executrix propounded for proof in solemn form a will which had been lost through her negligence, and substantially succeeded in the suit, it was held that as the litigation was rendered necessary by her negligence, the costs of the next of kin should be paid by her, and not out of the estate; and that as she would have had a right if the will had not been lost to prove it in solemn form, she ought to be allowed out of the estate such costs as she would have incurred in so proving it (c). Negligence of executor in losing will, personally liable for costs when.

In *Mitchell v. Gard* (d), on motion by an unsuccessful opponent of a will to have his costs allowed out of the estate, the Court (Sir J. P. Wilde) laid down the two following important rules for its future guidance:— General Rules.

Firstly. "If the cause of litigation takes its origin in the fault of the testator or those interested in the

(a) Coote & Tris., 4th Ed. 264.

(b) *Bennie v. Massie*, 35 L. J. P. & M. 124.

(c) *Burle v. Burle*, 36 L. J. P. & M. 125. (d) 3 Sw. & Tr. 273.

residue (a), the costs may properly be paid out of the estate" (b).

Secondly. "If there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent" (c).

Testator the
cause of litigation.

Sir James Hannen, in a recent case, says: "It appears to me that an executor is *prima facie* justified in propounding a will. * * I think the question of the testator's capacity was a very grave one and he could not be expected to take on himself the responsibility of leaving it undetermined. * * The decision of the question of costs must depend on the infinitely varying circumstances of each case; and the conclusion I have arrived at brings this case within the principle of the decisions to which I have referred on former occasions—was the testator really and substantially the cause of the litigation that has occurred?" The Court there ordered, although finding against the executor, that the costs should be paid out of the estate (d).

Successful
party.

A party successfully propounding a will, and discharging the duty of the executor, is entitled to his costs out of the estate (e).

And this, even when he propounds merely a

(a) And see *Thorncroft v. Lashmar*, 31 L. J. P. & M. 150 and 2 Sw. & Tr. 484; *Goodacre v. Smith*, L. R. 1 P. D. 539.

(b) And see *Smith v. Smith*, 4 Sw. & Tr. 3; and *Williams v. Henry*, 3 Sw. & Tr. 471; *Emberly v. Trevanion*, 29 L. J. (P. & M.) 143.

(c) *Bramley v. Bramley*, *Ib.* 430; and see *Critchell v. Critchell*, 32 L. J. P. & M. 108; *Ferrey v. King*, 3 Sw. & Tr. 51; *Tippett v. Tippett*, L. R. 1 P. & D. 54; *Summerell v. Clements*, 3 Sw. & Tr. 35.

(d) *Broughton v. Knight* L. R. 3 P. & D. 64.

(e) *Cross v. Cross*, 33 L. J. P. & M. 49.

codicil, which the executor has refused to propound (a).

Where the widow of a deceased propounded a will by which she was appointed sole executrix and universal legatee, one of the next of kin opposed on the ground (*inter alia*) of incapacity, and upon that issue the Court pronounced against the will, but, under the special circumstances of the case, declined to condemn the widow in costs; and it was held the next of kin, although not entitled to administration, was entitled to his costs out of the estate (b).

Allowed unsuccessful party out of estate.

Next of kin opposing will entitled to costs of estate, when.

Costs were allowed by the Court of Chancery out of the estate to the testator's widow who was also executrix, and who in a suit against her co-executors impeached the will on the ground of mental incapacity (setting up a will of prior date), and that, notwithstanding she had joined with the defendants in taking probate in common form, it appearing that she did so under a misapprehension, and on statements so made to her by the defendants that the act of taking probate with them was not such an assent to the will as could preclude her from impeaching it (c).

The right of the unsuccessful party to his costs will be forfeited:—

When an unsuccessful party forfeits his claim to have costs out of the estate.

(1) Where by his plea or his cross-examination he attempts to make a case of fraud or conspiracy, which he is not justified in doing by the evidence (d).

(2) When, prior to the commencement of the suit, circumstances, which, *prima facie*, cast suspicion on the instrument sought to be impeached, have or might have been removed by inquiries which he has made or has had opportunities of making (e).

(a) *Thorne v. Rooke*, 2 Curt. 799, *Williams v. Goude*, 1 Hagg. 577.

(b) *Oritchell v. C.* 32, L. J. P. & M. 108.

(c) *Wilson v. W.*, 22 Gr. 88. See also 24 Gr. 377.

(d) *Barry v. Butlin*, 2 Moo. P. C. 492.

(e) *Nicholls v. Binns*, 1 Sw. & Tr. 239.

Costs. (3) When from circumstances disclosed during the progress of the cause he might have earlier judged that he ought not to have proceeded further in it (*a*).

Unsuccessful party entitled to. An executor who has unsuccessfully propounded a will is entitled, subject to the rules and limitations above laid down, to have his costs out of the estate; but should the Court consider that the circumstances of the case do not entitle him to costs, it may either condemn the unsuccessful party personally in costs, or make no order as to costs, and so leave him to pay his own costs (*b*).

Next of kin or executors or legatees of a former will to have costs out of the estate. When a next of kin or person entitled in distribution, or an executor or legatee of a former will, successfully contests the validity of a will, the Court will give him costs out of the estate (*c*), or against the unsuccessful party (*d*).

According to Practice in Prerogative Court. By C. R. 3, *post*, already referred to, parties who put an executor on proof of a will in the Court of Probate possess the same privileges and are subject to the same liabilities with respect to costs as they were in the Prerogative Court.

Practice in Prerogative Court. "Where a next of kin calls for proof of a will *per testes*, and merely cross-examines the witnesses produced in support of that will, he is not subject to costs generally speaking. I add this last, because I can easily conceive a case in which even a next of kin may exercise his undoubted right in this matter

Costs.

(*a*) *Dean v. Russell*, 3 Phill. 334. (*b*) *Coote & Tr.*, 4 Ed. 265.

(*c*) If the unsuccessful party is condemned in costs and unable to pay them, the other party, if he takes probate of a former will, or letters of administration with the will (a former will) annexed, or administers to the estate of the deceased, may take them out of the estate as part of the expenses incidental to obtaining probate or administration. But if he does not prove a former will himself, or does not administer, he loses his claim to costs as against the estate (*e*).

(*d*) *Critchell v. Critchell*, *supra*. See also *Bell v. Armstrong*, 1 Add. 375.

(*e*) *Nash v. Yelloly*, 3 Sw. & Tr. 59.

so vexatiously as to make himself responsible, if not wholly, in part, for the costs of his opponent. But next of kin are favourites of courts of law; their interests, in cases of intestacy, accrue by *mere* operation of the law, and they have the plainest and most undoubted right to be satisfied that those interests are not defeated but upon good and sufficient grounds. A legatee under a former will is not so favourably regarded: he *may*, certainly, call for proof *per testes* of a will by which his interests under a former will are prejudiced; he as certainly may interrogate the witnesses produced in support of that will; but *he*, I apprehend, must clearly do this at the risk of being condemned in costs, if the Court has reason to *suspect* him of undue and vexatious litigation. And this especially in a case like the present, where the legatee is a *mere* legatee, acting for his own sole benefit; that is, where he is neither an executor at the same time of the will under which he claims, nor a trustee in it for the benefit of some other person or persons, for whose interest, in common with his own, he can be suggested to have acted in opposing the latter will" (a).

Legatee under former will.

Under Rule 41, E. C. P., Rules of 1862 (still in force in Prob. Div.,) C. R. 76, *post*, in all cases a party opposing a will may, with his pleas, give notice to the party setting up the will, that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances, according to the practice of the Prerogative Court (b).

Notice

(a) *Per* Sir John Nicholl in *Urquhart v. Fricker*, 3 Add. 57.

(b) See *Leeman v. George*, L. R., 1 P. D. 542; *Cleare v. Cleare*, *Ib.* 655; *Ireland v. Rendall*, *Ib.* 194; *Smith v. Fletcher*, L. R., 2 P. D. 20.

- Object of suit. A person entitled to distribution, who merely puts the executors to strict proof of a will in solemn form, if he has reasonable ground for doing so, will generally be allowed his costs out of the estate. But if it appears that his object in calling for such proof was not simply to obtain the judgment of the Court of Probate as to the validity of the will, but to elicit evidence which might be used by him in a suit instituted in another Court, he will not be allowed his costs out of the estate (*a*).
- Costs out of estate. Costs are allowed to the unsuccessful party out of the estate where the validity of a will is contested on a doubtful point of law (*b*).
- Doubtful question of law. Also where the case, from its peculiar circumstances, pre-eminently calls for investigation (*c*).
- Liability of heir at law as to costs when cited. It would seem to have been the intention of the legislature, by sec. 61 of "The Probate Act, 1857," (sec. 49 S. C. Act), to extend to the heir at law the same privileges with respect to costs as are enjoyed by the next of kin (*d*).
- Heir at law to be cited. Sir C. Cresswell in *Fyson v. Westrope* (*e*) observed: "I think the effect of the 61st (*f*) section of the Probate Act, 1857, is to put the heir at law so much in the same position as the next of kin, that in deciding the question of costs I ought to apply the same principle in both cases, and consequently the heir at law is liable to costs to the same extent as the next of kin was in the Prerogative Court." "In this view, therefore, parties setting up a will affecting real estate are bound to cite the heir at

(*a*) *Swifen v. Swifen*, 29 L. J. P. & M. 153; 1 Sw. & Tr. 283.

(*b*) *Robins v. Dolphin*, 1 Sw. & Tr. 518, and *Brooke v. Kent*, 3 Moo. P. C. 334; and see *Dean v. Russell*, 3 Phill. 334.

(*c*) *Coote & Tr.* 3rd Ed. 245; *Jones v. Godrich*, 5 Moo. P. C. 16; *Cventry v. Williams*, 3 No. Ca. 172; *Symons v. Tozer*, 3 No. Ca. 55; *Keating v. Brooks*, 4 No. Ca. 273; *Gregory v. H. M. Proc.* 4 No. Ca. 643.

(*d*) *Fyson v. Westrope*, 1 Sw. & T. 279.

(*e*) 1 Sw. & Tr. 282.

(*f*) *Vide ante*, see 49 S. C. A:

law and bring him into court ; if they have omitted to do so, and take probate in common form, and afterwards have occasion to use the probate in a suit with the heir at law, he would be at liberty to dispute its validity (s. 64). But then the 65th sec. leaves it to the discretion of the court before which in any such action or suit the original will shall be proved and produced, to direct by which of the parties the costs shall be paid."

Interveners in the English Court of Probate possessed the same rights and were subject to the same limitations and the same rules, with respect to costs, as they were in the Prerogative Court. (C. R. 4, *post.*)

An heir at law, who intervenes in a suit, and opposes a will, is entitled to costs if the will is pronounced against (a).

Next of kin intervening in a question as to the due execution of a will, in order to take the opinion of the court as to alterations which appeared the will affecting their interests, were (although the alterations were pronounced invalid) allowed their costs out of the estate (b).

But where the executor in his affidavit of scripts in effect denied the validity of a legacy to a person who intervened, but subsequently by his plea admitted its validity, and such intervener having appeared by counsel at the hearing, the Court refused to allow him his costs out of the estate (c).

It being doubtful whether the unsuccessful plaintiff, in a suit for revocation of probate, would be able to pay the costs of an intervener who had propounded the will, the Court ordered that the inter-

(a) *Rayson v. Parton*, 39 L. J. P. & M. 20. In this case the executors were personally charged with the costs.

(b) *Burgoyne v. Showler*, 1 Rob. 5.

(c) *Shaw v. Marshal*, 1 Sw. & Tr. 129.

- Next of kin condemned in costs.** vener's costs should be paid out of the estate : a next of kin, who unsuccessfully opposed a will, was condemned in the costs of another next of kin, whom he cited to see proceedings, and who had appeared and pleaded, but had taken no other part (a).
- Apportionment of costs, real and personal estate.** Where the personal estate is insufficient, costs are ordered to be paid ratably out of real and personal estate, according to their respective values b).
- Costs taxed distributively.** Where the heir at law, and an executor of a former will respectively contested the validity of certain testamentary instruments, but pleaded separately and were condemned in the costs of the suit, the Court, on reviewing its decree as to costs, held, that each party was liable in respect to that part of the costs which belonged to his own case ; and where costs had been incurred in any matter equally applicable to both parties, so that it could not assign them more to one than to the other, that portion of costs was directed to be taxed equally between them (c).
- Creditor.** The costs incurred by a creditor in obtaining the appointment of an administrator, *pendente lite* were allowed out of the estate (d).
- Costs of Administrator pendente lite.** In a testamentary suit, condemnation in costs includes all the charges of an administrator *pendente lite* (e).
- Party not appearing.** In decreeing probate of the contents of a destroyed will, the Court condemned in costs a defendant who had destroyed the will, although he had not entered an appearance (f).

(a) *Cross v. Cross* 3 Sw. & Tr. 392 ; and 33 L. J. P & M. 49.

(b) *Smith v. Hopkins*, L.R. 4 P.D. 84. *Bennett v. Foster*, 2 Phill. 161.

(c) *Fyson v. Westrope*, 1 Sw. & Tr. 279. See also *Rayson v. Parton*, L. R. 2 P. & D. 38.

(d) *Tichborne v. Tichborne*, 1 L. R. Prob. 730.

(e) *Fisher v. Fisher*, L. R., 4 P.D., 231.

(f) *King v. Gaillard*, 37 L. J., P. & M. 4.

W. J., having obtained probate in common form of a paper professing to be the will of A. L., which, at the suit of the next of kin of the deceased, was revoked, the Court holding that the paper in question was not the will of the deceased, and that W. J. had been guilty of fraud in obtaining probate of it, and in contesting the suit. W. J., though suing *in forma pauperis*, was condemned in the costs of the suit (a). Where probate obtained by fraud and revoked.

Where a will was propounded by a married woman, and her husband had not been joined with her as a party to the suit, the Court having pronounced against the will, condemned the wife in the costs. The suit was for revocation of probate obtained by the wife, knowing that the will had not been duly executed (b). Married women.

In an action for probate in the Probate Division H. C. J., tried by a jury, in which the verdict was for the plaintiff, it was held that that Court has power to condemn in costs the defendant, a married woman, having general separate estate (c).

Of the Liability of a person suing in Formâ Pauperis for Costs.

When a person suing in *in formâ pauperis* is unsuccessful in his suit, and his conduct has been vexatious, or such as to expose him to suspicion of fraud or improper acts, the Court may condemn (d) him in costs, but it will be a matter of discretion (e) whether the Court, unless he should cease to be a pauper, would proceed to enforce their payment by attachment (d).

(a) *Carless v. Thompson*, 1 Sw. & Tr. 21.

(b) *Clarkson v. Waterhouse*, 2 Sw. & Tr. 378. See also *Arbery v. Ashe*, 1 Hagg. 219.

(c) *Morris v. Freeman*, 3 P. D. 65.

(d) *Carless v. Thompson*, *supra*.

(e) *Rind v. Davies*, 4 Hagg. 394.

Where a pauper was condemned in costs in the Prerogative Court for vexatious conduct, the Court intimated that it would not enforce the decree against her unless she should succeed to property (a).

Of Security for Costs.

By Order of February 13, 1830 (b), it was provided, that, in all cases, the Prerogative Court might, upon application made to it, direct security for costs to be given by either or all of the parties.

Security for
costs directed
to be given.

When a will was propounded, and an appearance in opposition thereto had been given for the only next of kin of the deceased, who was absent from England, the Court directed that he should, on account of his absence, give security for costs in the sum of 50*l* (c). And where a party who had propounded a will afterwards became bankrupt, he was also directed to find security for costs (d).

Security for
costs refused.

Where a party to a suit, though a foreigner, was in England, and there was no reason to suppose that he was on the point of going away, the Court declined to make an order for security for costs (e).

Principles of and Rules for Taxation of Costs (f).

Where the practice of the Prerogative Court in reference to questions arising on taxation of costs was applicable, the Court of Probate was bound to abide by it; but where it was inapplicable it was not bound by it, and would exercise its own discre-

(a) *Wagner v. Mears*, 2 Hagg. 524; see also *Lemann v. Bonsall*, 1 Add. 389, and *Coote & Tris.* 3rd Ed. 252.

(b) 2 Hagg. p. xvi. and *Coote & Tr.* 3rd Ed. 251.

(c) *Hillam v. Walker*, *supra*.

(d) *Goldie v. Murray*, 2 Curt. 797.

(e) *Crispin v. Doglioni*, *supra*.

(f) *Coote*, 3rd ed. 252.

tion. Thus the practice of the Prerogative Court in reference to the number of counsel to be allowed was held to be inapplicable to the mode of procedure in the Court of Probate, and the registrar was held not to be bound by it (a). Rules for taxation of costs.

By E. C. P. Rule 10 (1858), when a caveat had been entered, and subsequently warned, and such warning resulted in the commencement of contentious proceedings, the expenses of the entry of such caveat and the warning thereof were, upon taxation, considered as costs in the cause. Coote & Tris. 4th Ed. 252.

If contentious proceedings arose from the service of a citation, the expenses of the citation and service thereof were, upon taxation, considered as costs in the cause. (E. C. P. Rule 15 (1858) C. R. 53 *post*.)

In making an allowance for briefs, the registrar should consider whether they have been made unnecessarily long and expensive (b). Where two witnesses were called to prove a fact which was material to the issue, but which was not controverted, the costs of one witness only were allowed. The question as to the number of counsel to be allowed, is one entirely in the discretion of the registrar, and the Court will not interfere with such discretion. More than one consultation in the progress of a cause is never allowed (c). Taxation.

When the costs of an unsuccessful party to a testamentary suit are ordered to be paid out of the estate, they are not taxed on so liberal a scale as between proctor and client (d).

If more than one-sixth was deducted from any bill of costs taxed as between practitioner and client, no costs incurred in the taxation thereof were allowed

(a) *Braine v. Braine*, 1 Sw. & Tr. p. 271.

(b) *Ibid*.

(c) *Edwards v. Payne*, 1 Sw. & Tr. 276.

(d) *Jeffery v. J.* 28 L. J. P. & M. 43.

as part of such bill (a). But this was held not to apply where the costs were directed to be paid out of the estate.

Of Payment of Money out of Court.

For old practice as to payment in and out of Court, see *Taylor v. Taylor* (b), and *Franco v. Franco* (c).

(a) C. R. 64 *post*, & Coote & Tr, 3rd Ed. 273.

(b) 1 Lee, 527.

(c) *Ibid.*, 659, 661. & C. R. 97, E. C. P. Rules of 1862.

APPENDIX A.

CONTENTIOUS BUSINESS.

Rules and Instructions governing the Practice of the Court of Probate in England, in force 5th Dec., 1859.

[NOTE.—The following Rules and Orders, with forms, in respect to contentious business, published in the Jurist (a), were in force in the English Court of Probate, 5th Dec., 1859, and are set forth here for reference as to the practice at the date mentioned, in that court, within the meaning of sec. 32 S. C. Act. Where any of such rules do not indicate the practice in Ontario, by reason of provision having been made in the S. C. Act or Rules, the section of the Act or number of the Rule containing such provision is referred to in the margin. And it should be borne in mind that it is “so far as the circumstances of the case will admit,” that the practice of the Court of Probate in England, at the date mentioned, is to be followed, and is, in fact, followed in the Surr. Courts, under the section referred to of the S. C. Act.]

The Act referred to in the following rules is the English Court of Probate Act, 1857; sections of which are noted in the margin of S. C. Act *ante*.

[Certain proceedings, *e. gr.* citations, caveats, warning of caveats and affidavits, are common to contentious and non-contentious business. D. & B. 593.]

“1. All proceedings in the Court of Probate, or in the registries thereof, in respect of business not included in the Act itself, under the expression, “common form of business,” except the warning of caveats, shall be deemed to be contentious business.*

Nature of contentious business.

* See S. C. R. 1, and S. C. A. sec. 2 *ante*.

(a) 4 Jur. (N. S.) pt. II. pp. 7-9, 24, 27, 37-38, 45; & 5 Jur. (N. S.) pt. II. p. 107 (vis. of Jan. and Nov., 1858, and Mar. 1859); & 27 L. J. (N.S.) Prob. 1, & 93. And see Horsey, 3rd Ed. App.

PARTIES TO CAUSES.

Voluntary proof by executors in solemn form retained.

2. Executors or other parties who, previously to the passing of the Act, might prove wills in solemn form of law, shall be at liberty to prove wills under similar circumstances and with the same privileges, liabilities and effect as heretofore.

Compulsory proof in solemn form continued.

3. Next of kin and others who, previously to the passing of the Act, had a right to put executors, or other parties entitled to administration, with will annexed, upon proof of a will in solemn form of law, shall continue to possess the same rights and privileges, and be subject to the same liabilities, with respect to costs, as heretofore.

Rights of intervening parties continued.

4. Parties who, previously to the passing of the Act, had a right to intervene in a cause, shall continue to possess the same right, subject to the same limitations, and the same rules with respect to costs, as heretofore.

CAVEATS.

* By Surr. Court Rule 19 — "three months."

5. A caveat shall remain in force for the space of six months, and then expire and be of no effect, but may be renewed from time to time as heretofore.

Warning.

A caveat shall be warned at the place mentioned in it as the address of the person who entered it. It shall be sufficient for the warning of a caveat that one of the Registrars send by the public post a warning signed by himself, and directed to the person who entered it, at the address mentioned in it.

On appearance to warning cause to commence.

6. Upon a party appearing in answer to the warning of a caveat, the matter shall be entered as a cause in the court book, and the contentious business shall thereupon be held to commence. (a)

CITATIONS. (b)

On voluntary proof in solemn form. Citation to begin contention.

7. When a party proposes to prove a will or codicil, in solemn form of law, and no caveat has been entered, or a caveat has been entered and no appearance given to the warning thereof, the contentious business shall be held to commence with the extracting of a citation, in the forms i. and ii. *post*, or in some similar form.

Proceedings after citation to be

8. Citations to see proceedings may be extracted from the registry, on the application of any party to the cause. (See

(a) See S. C. Rules 23 & 24.

(b) See S. C. Rules 25 & 26.

form post.) Before a party can proceed, after the service of upon appear-
a citation an appearance must have been previously entered ance, personal
by, or on behalf of, the parties cited, or on affidavit of per- service or
sonal service must have been filed in the registry, or the leave of the
order of the judge, founded on an affidavit, and giving leave court.
to proceed, must have been obtained and filed in the
registry.

9. Every citation shall be written or printed on parch- Citation how
ment (a), and the party taking out the same, or his proctor, so- issued and
licitor, or attorney, shall take it, together with a præcipe, a served.
form of which is given, marked No. v. (*post*), to the Registry, And see S. C.
and there deposit the præcipe, and get the citation signed R. 25 and 26.
and sealed. The address given in the præcipe must be within
three miles of the General Post Office.

APPEARANCE, (1) AND DEFAULT OF.

(1) See S. C.
R. 23.

10. The entry of the appearance of a party shall be accom-
panied by an address within three miles of the General Post
Office.

11. It shall be sufficient to leave all pleadings and other Service of
proceedings not expressly requiring personal service under pleading and
these rules and orders at the address furnished so as afore- proceedings.
said by the plaintiff and defendant respectively.

12. In case the party cited does not appear within the time Cause to pro-
limited in the citation, the plaintiff shall allege the default of ceed on non-
appearance on the record, and the cause shall thereupon pro- appearance to
ceed in default. citation.

13. The form to be used in entering an appearance is given. Form of ap-
No. vi. *post*. pearance.

PLEADINGS.—DECLARATION.

14. In case of proving a will in solemn form of law, the Declaration on
plaintiff shall declare in the form No. vii., or as near thereto solemn proof
as the circumstances of the case admit, and such declaration will.
shall be delivered to the defendant, and a copy thereof filed
in the registry upon one and the same day.

15. The declaration may be delivered to the defendant at Declaration,
any time after the defendant has entered an appearance. If how delivered
the plaintiff do not deliver his declaration within one month or compelled.
after an appearance has been given, the defendant may apply
to the Judge in Chambers to fix a time within which such
declaration shall be delivered.

(a) Parchment not required in Surr. Ct.

Declaration, 16. In case of proceedings in default, the plaintiff shall file how, and when his declaration in the Registry within eight days from the filed in de- last day allowed in the citation for the appearance of the de- fault. defendant.

PLEA.

Plea by de- 17. The defendant, if desirous of pleading, must deliver defendant how his plea to the plaintiff within eight days after the service and when filed. of the declaration, and file a copy thereof in the Registry on one and the same day, otherwise he will not be permitted to plead, except with the permission of the Judge. Forms of pleas are given in Nos. x. and xi., *post*.

With leave, 18. If the plaintiff propound a will, and the defendant in conflicting will his plea allege the existence of a will of later date, the plain- may be set up by plaintiff tiff, as well as the defendant, may, with and subject to the and defendant. permission of the Judge, adduce proof on the trial of the validity of the will upon which he relies.

(1) See S. C. R. 17.

SCRIPTS (1).

Scripts to be 19. In testamentary causes, the several scripts of the testator, brought in as —that is to say, wills, codicils, drafts of wills or codicils, or heretofore and any not depos- written instructions for the same, shall continue to be brought ited to be spe- into the Registry as heretofore; and for this purpose every cified in affi- plaintiff shall, at the time of filing the copy of his declaration davit. in the Registry, file therewith an affidavit of scripts to the effect of form xii. (*post*), and in like manner, the defendant, upon filing the copy of his plea, shall file therewith a similar affidavit.

The time for the filing of these affidavits of scripts may be varied, by order of the Judge, on the application of either party.

Every script coming within the terms of the affidavit, and of which the deponent has any knowledge, is to be specified therein, and every script in the custody, or under the control of the party making the affidavit, is to be annexed thereto, and deposited therewith in the Registry.

AMENDMENT OF PLEADINGS.

As to further 20. Either of the parties may give in such further plead- pleadings and ings as he may be advised. If either party desire to amend amendment of his pleadings, he may do so by permission of the judge, and pleadings. in such form and under such terms as the judge may approve.

The form of the declaration and plea will, it is presumed, be a sufficient guide as to the form of any further pleadings.

21. If the defendant or the plaintiff shall be of opinion that the declaration or plea, or subsequent pleading, does not disclose sufficient to enable him to proceed with safety, he may apply to the judge to order the pleadings to be amended, and, if necessary, further application may be made to the judge thereon. Defendant or plaintiff may apply for amendment of the other pleading.

ISSUE.

22. Within eight days after the delivery of the last pleading in the cause, the plaintiff is to deliver to the defendant the issue in the form No. xiii. (*post*), or in a form as near there-to as the circumstances of the case will admit. Form of issue.

NOTICE OF TRIAL AND MODE OF TRIAL.

23. The plaintiff, after delivery of the issue, shall give notice to the defendant that after the expiration of eight clear days he intends to apply to the Court to try the question at issue before itself, either with or without a jury, or to direct an issue to be tried before a judge of assize, as the case may be; and if the plaintiff do not give such notice within sixteen days from the day on which the issue was delivered, the defendant may give a similar notice to the plaintiff. Notice of trial.

A form of notice No. xiv. (*post*), is subjoined.

24. A copy of every such notice shall be filed in the registry upon the day on which the same is served upon the opposite party in the cause. Filing of copy notice.

25. In each case the judge shall direct, and if necessary, after hearing the parties, in what mode the cause shall be tried. Judge to direct mode of trial.

RECORD.

26. After the direction of the judge has been obtained as to the mode in which the cause is to be heard, the plaintiff shall, within four clear days, deposit the record of the cause in the registry. Record.

The record is to conclude with a statement of the mode in which the judge has directed the cause to be tried, as in the form No. xv., *post*.

SETTING DOWN CAUSE.

27. The plaintiff shall, on the day on which he sets down the cause for trial, give notice to each party for whom an ap-set down. Cause; how ap-set down.

pearance has been entered, of his having done so, and if he delay setting down the cause as ready for trial, for the space of one month after the Court has directed the mode in which the question at issue shall be tried, the defendant may set the cause down as ready for trial, and give a similar notice to the plaintiff and the aforesaid other parties. A copy of every such notice shall be filed in the registry, and the cause, excepting the judge shall otherwise direct, shall come on in its turn.

Record in default of appearance.

28. In default of the appearance of the party cited, a record in form No. xvi. (*post*), or as near thereto as can be, shall be filed in the registry.

SUBPŒNAS.

Subpœnas.

29. Every subpœna shall be written on parchment (a), and may include the names of any number of witnesses. It will be obtained at the registry. (See Forms xviii., xix.)

NOTICE TO ADMIT AND PRODUCE DOCUMENTS.

Notice to admit and costs of proof on refusal.

30. Either the plaintiff or the defendant may call upon the other party by notice in writing, to admit any document saving any just exceptions, and in case of refusal or neglect to admit the same, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial the judge shall certify that the refusal to admit was reasonable, and no costs of proving any such document shall be given, except in cases where the omission to give the notice is, in the opinion of the Registrar a saving of expense (b).

Production of documents, how enforced.

31. Applications for the production of instruments purporting to be testamentary, and shewn to be in the possession or under the control of any person or persons as mentioned in the 26th section (c) of the Act, may be made to the judge on motion or petition, or by summons served on the opposite party, in any suit and upon motion and affidavit in cases where no suit is pending.

HEARING.

Hearing.

32. The hearing of the case shall be conducted in Court, and counsel shall address the Court subject to the same rules

(a) Parchment not required by Surr. Courts.

(b) The notice is to be a reasonable time before the trial. Taylor on Evidence, 3rd Ed. 638.

(c) 22nd sec S. C. Act.

and regulations as now obtain in the Courts of Common Law.

POSTEA.

33. After the conclusion of the trial the registrar shall *Postea*. enter on the record, the finding of the jury or the decision of the judge, in a form corresponding, as near as may be, with that given in Nos. xxvi. and xxvii., and shall sign the same.

REAL ESTATE.

34. Any person proceeding to prove a will in solemn form Heirs or devisees how cited on proof of will in solemn form. or to revoke the probate of a will, may, if the will affects real estate, apply to the judge for an order authorising him to cite the heir or heirs at law, or other person or persons pretending interest in such real estate, and the judge on being satisfied by affidavit that the will in question does affect or purport to affect the real estate shall make an order authorising the person applying to cite the heir or heirs at law or other such person or persons as aforesaid : provided always that the judge may make any special directions as to the persons to be cited which he may think the justice of the case requires.

NEW TRIAL OR RE-HEARING.

35. An application for a new trial may be made to the New trial, Court of Probate in respect to causes tried before a jury motion for. within ten days of the day on which the cause was tried, or on the first sitting of the Court after the cause has been tried.

36. An application for a re-hearing of any case tried before Re-hearing. the judge without a jury, and in which evidence is given *viva voce*, may be made within ten days from the day on which the same was heard, or at the first sitting of the Court after the cause has been heard (a).

GENERAL MATTERS.

37. If the plaintiff or defendant in any cause, unless by As to default of plaintiff or defendant to deliver pleadings. leave of the judge previously obtained, fail to deliver the

(a) When a cause has been heard in the Probate Division before a judge without a jury, the evidence being given *viva voce*, the parties may, if they please, apply for a re-hearing under the Rule (i. e., Rule 60 of 1862, corresponding with this rule, excepting as to the time, which is 14 days instead of 10 days); or they may, without doing so, appeal from the decision of the judge on the facts as well as the law, to the Court of Appeal.—*Sugden v. Lord St. Leonards*, 1 P. D. 154.

declaration, plea, or other pleading within the time specified in these rules, the other party in the cause shall not be compelled to receive the same unless by direction of the judge. The expense of every such application to the judge shall fall on the party who has caused the delay.

Service, citations, &c., to be advertised.

38. Citations, notices and other processes heretofore in use and still retained, are to be inserted in the *London Gazette* and in such of the leading morning and evening papers and such local papers as the judge may from time to time direct, instead of being served on the Royal Exchange (a).

Affidavits out of date not receivable without leave of judge.

39. Where a special time is limited for filing affidavits, no affidavits filed after that time shall be used in Court, except by leave of the judge.

Inventories to be used in cause.

40. In contentious business, inventories, and not merely declarations of the personal estate and effects of the deceased, are to be used unless by order of the judge. The form of inventory is given No. xxviii., *post*.

Notices to be in writing.

41. All notices required by these rules or by the practice of the Court, are to be in writing.

INTEREST CAUSES.

Each party may deny the hostile interest and with leave prove his own.

42. In interest causes, as heretofore, each party shall be at liberty to deny the interest of the other, and in such cases, both parties may, with and subject to the permission of the judge, adduce proof on one and the same trial, of their interest respectively.

Superior interest to be negatived by each party.

43. In interest causes, the pleading of each party must show on the face of it, that no other person exists, having an interest superior to that of the claimant.

Forms of pleadings.

44. Forms of the declaration and plea in an interest cause are given in Nos. viii. and xi. *post*.

PROCEEDINGS BY PETITION.

Act on petition, when and how delivered.

45. In proceedings by petition the plaintiff shall within four clear days after an appearance has been entered for the defendant, or when the defendant is already before the Court, within four clear days from the day on which he claims to be heard, by petition deliver his act to the defendant, and file a copy thereof in the Registry upon one and the same day.

Answer of defendant thereto.

46. The defendant shall, within eight days after the delivery of the act, deliver his answer to the plaintiff, and file a copy thereof in the Registry upon one and the same day.

(a) See S. C. R. 25 and 26.

47. The same course shall be pursued with respect to the reply, rejoinder, &c., until the petition is concluded. Course until petition concluded.

48. Both the plaintiff and the defendant shall, within eight clear days from the day upon which the petition is concluded, file in the Registry such affidavits as may be necessary in support of their several averments therein. A form of petition is given in No. xxix. *post*. Affidavits after petition concluded.

APPEALS (a).

49. No petition of appeal shall be lodged against any sentence of the Court of Probate unless within a month from the delivery of the sentence appealed from, or within such other time as the judge may direct, and unless notice of such appeal has been given to the opposite party in the cause, and filed in the Registry. Appeals.

50. Parties may proceed to carry into effect the decision of the Court of Probate, notwithstanding any such notice of such appeal, unless the judge shall otherwise order. Notice of appeal on stay of proceedings.

51. After notice of appeal has been given, the judge of the Court of Probate may order the execution of his decree to be suspended on such terms as he sees fit. Judge may, however, stay proceeding pending appeal.

TIME.

52. The judge shall in every case in which a time is fixed by these rules for the performance of any act, have power to extend the same to such time, and with such qualifications and restrictions, and on such terms as to him may seem fit. Time for proceedings may be extended by judge.

Further Rules and Orders for Her Majesty's Court of Probate, made 18th October, 1858, came into force 2nd November, 1858.

53. "15. If contentious proceedings arise from the service of a citation, the expenses of the citation and service thereof shall, upon taxation, be considered as costs in the cause. Cost of citation to be in cause if one ensue.

54. "16. The entry of every appearance to a citation, or to a warning to a caveat, shall hereafter be made in the principal registry. Not applicable to Sur. Courts of Ontario.

55. "17. The words 'or of a registrar of the principal registry' are to be added at the end of Rule 74, of the rules, orders and instructions heretofore issued for the district registrar. This refers to a common form rule.

(a) See sec. 31 S. C. Act, and S. C. Rule 50.

Ten days to elapse between setting down cause and trial.

Affidavits of scripts to be filed eight days after appearance.

Scripts affidavits to be close until all are filed.

Declaration of plaintiff need not be filed till eight days after defendant scripts affidavits.

Defendant specify the precise object of his contention.

Registrar may extend time for filing pleadings or proceedings.

56. "18. No cause is to be called on for hearing or trial until after the expiration of ten days from the day when the same has been set down as ready for hearing or trial, and notice thereof has been given, save with the consent of all parties to the suit.

57. "19. In testamentary causes, the plaintiff and defendant, within eight days of the entry of an appearance on the part of the defendant, are respectively to file their affidavits of scripts.

58. "20. No party to the cause, nor his or her proctor, solicitor or attorney, shall be at liberty, except by leave of the judge, to inspect the affidavit as to scripts, or the scripts, or exhibits annexed thereto, filed by any other party to the cause until his own affidavit as to scripts shall have been filed.

59. "21. The plaintiff shall not be compelled to deliver his declaration to the defendant, or to file a copy thereof, until the expiration of eight days after the defendant has filed his affidavit as to scripts.

60. "22. In all causes relating to grants of probate or letters of administration, it shall be competent to the defendant, on the day upon which an appearance is entered by him or on his behalf, or on the day upon which he receives from the plaintiff the declaration in the cause, or within three days thereafter to notify to the plaintiff in writing the object for which he has so entered his appearance, and in such notice to set forth that he admits the validity of the will; or the intestacy of the deceased, and the relationship claimed by the plaintiff to the deceased; and demand to be heard on petition in respect of some other matter to be therein stated. The plaintiff shall upon receiving such written notice, unless otherwise ordered by the judge, within eight days, file an act on petition. In case he shall fail to do so, the defendant shall be at liberty to file his act on petition, and the cause shall be heard by affidavit, unless the judge shall direct otherwise.

61. "23. In order to prevent the time limited for bringing in declarations, pleas, and other pleadings and proceedings, from expiring before application can be made to the judge for an extension thereof, any one of the registrars may, upon reasonable cause being shown, extend the time for bringing in such declaration, plea, or other pleading or proceeding, provided that such time shall in no case be extended beyond the day upon which the judge shall next sit in open court or in chambers.

62. "24. A receiver (a) of real estate pending suit is to give bond in the form annexed to these rules and orders, or in a form as near thereto as the circumstances of the case will admit of, with two sureties, and in a penalty of such an amount as may be directed by the judge." As to bond by receiver of real estate.

TAXING BILLS OF COSTS.

63. "25. When an appointment has been made by the registrar for taxing any bill of costs, and one party only attend at the time appointed, the registrar may, nevertheless, proceed to tax the bill, after the expiration of a quarter of an hour, upon being satisfied by affidavit that the other party had due notice of the time appointed." Fifteen minutes' grace.

64. "26. If more than one-sixth is deducted from any bill of costs taxed as between party and party, or as between practitioner and client, no costs incurred in the taxation thereof are to be allowed as part of such bill." If more than one-sixth taxed off.

RULES AS TO SUMMONSES.

65. "1. A summons may be taken out by any person in any matter, whether contentious or non-contentious." By whom taken out.

66. "2. A printed form must be obtained and filled up with the object of the summons, and a half-crown stamp affixed. It must then be taken to the clerk of the papers, who will fill the blank left in the printed form for the time when the summons is to be made returnable, and get the summons signed by the registrar." Form and filling up.

67. "3. The clerk of the papers is then to enter the name of the cause or matter, and of the attorney taking out the summons, in a book to be called "the *summons book*," and return the summons (with the stamp obliterated), signed, to the applicant, who is to serve a copy on the opposite party. This copy (except in cases where the consent of the party to be served has been obtained and endorsed on the summons) must be served on the opposite party one clear day at least before the summons is returnable, and before seven p.m. On Saturday, the copy of the summons is to be served before two p.m." Entry and service.

68. "4. On the day and at the hour mentioned in the summons, the party issuing the same is to present himself, with the original, at the Judges' Chambers." Attendance.

(a) There is no provision for appointment of receivers in the S. C. Act. *Vide* note to sec. 51.

- Hearing. 69. "5. Both parties will be heard by the judge, who will make such order as he may think fit, and a note of such order will be made by the registrar in the summons book.
- Half an hour's grace on attendance. 70. "6. If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the other party shall be at liberty to go before the judge, who will thereupon make such order as he may think fit.
- As to non-attendance. 71. "7. An attendance on behalf of the party summoned for the space of half an hour, if the other party do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the judge on that occasion.
- Order. 72. "8. If a formal order is desired, the same may be had on the application of either party, and for that purpose the original summons, or the copy served on the opposite party, must be filed in the registry. An order will thereupon be drawn up and delivered to the person filing such summons or copy. The clerk of the papers, before giving out the order, is to see that a half-crown stamp has been affixed to it, and is to obliterate such stamp.
- Consent orders 73. "9. If a summons is brought to the clerk of the papers, with a consent, signed by the party summoned, or his proctor, solicitor or attorney, indorsed thereon, an order will be drawn up without the necessity of going before the judge: Provided that the order sought is, in the opinion of the registrar, one which the judge, under the circumstances, would make."

Further Rules and Orders.

Feb. 24, 1859.

- Appce. to set forth interest. 74. "27. The entry of an appearance to the warning of caveat shall set forth the interest in the effects of the deceased testator or intestate of the person on whose behalf such appearance is entered.
- Party to declare or plead. 75. "28. In a testamentary cause—when a will is opposed by a next of kin of the deceased testator, or by a person who would be entitled in distribution to his effects in case he should be pronounced to have died intestate, the party claiming under the will, though defendant in the suit, shall be the party to bring in the declaration, and the party claiming under an intestacy the party to plead thereto, at the times and in the manner required by former rules and orders, in respect of contentious business in this court.

76. "29. In all cases the party opposing a will may, with his Party opposes, give notice to the party setting up the will that he ing will may merely insists upon the will being proved in solemn form of that he only in-law, and only intends to cross-examine the witnesses pro- tends to cross-examine witnesses. No. 41 of Rules of 1862. liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Prerogative Court.

This 23rd day of February, 1859."

FORMS IN CONTENTIOUS BUSINESS,

Being those referred to in Con. Rules ante.

CAVEAT.—WARNING TO CAVEAT (a.)

No. 1.]

CITATION TO SEE WILL PROVED.

In Her Majesty's Surrogate Court, County of

VICTORIA, By the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith :

To of in the County of

(b) WHEREAS it appears by an affidavit of A. B. of , sworn on and filed in the Registry of our said Surrogate Court, that the said A. B., claiming to be the executor of Andrew Mercer, late of , deceased, who died on or about the day of at , intends to prove in solemn form of law as well the alleged last will and testament of the said deceased, bearing date the day of , as also the [first] codicil thereto, and bearing date the day of [and so on for any other codicils], and that the said deceased died a bachelor without parent [or as the case may be] and that you the said are the natural and lawful , and only next of kin of the said deceased, and the only per-

(a) Forms 1 and 2,—The Caveat, and the Warning to Caveat,—among the Forms for Contentious Business in the English Court of Probate prior to 5th December, 1859, are omitted from the above, as forms for those instruments are provided by the S. C. Rules *ante*. See also p. 341 *ante*.

(b) This form of commencement being a slight alteration of the form previously used, was introduced by Rule, 8 E. C. P. 1858, Coote, 3rd Ed. 363 *a*.

son entitled to his personal estate and effects [*or as the case may be*], in case he be pronounced to have died intestate : NOW THIS IS TO COMMAND YOU, the said , that within days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Registry of our said Surrogate Court in support of any interest you may have in the personal estate and effects of the said deceased : AND TAKE NOTICE that in default of your so doing, the Judge of our said Court will proceed to hear the said will [*and codicils*] proved in solemn form of law, and to pronounce sentence in regard to the validity of the same, your absence notwithstanding.

Dated this day of 18 , in the year of our reign.

E. F.,

Registrar.

Citation to see will proved. }
[Name of practitioner], }

Indorsement to be made after service.

This citation was served by G. H. on the within named of
at on the day of 18 . (Signed), G. H.

No. II.]

CITATION TO BRING IN PROBATE.

In Her Majesty's Surrogate Court of the County of ,

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain
and Ireland, Queen Defender of the Faith :

To of , in the County of

Whereas, it appears by an affidavit of C. D., of ; sworn on and filed in the Registry of our said Surrogate Court, that probate of the alleged last will and testament [*with codicils thereto*] of A. B., late of , deceased, was on or about the day of 18 , granted to you by our said Surrogate Court, and that the said deceased died a bachelor without parent [*or as the case may be*], and the said C. D. is one of the natural and lawful brothers, and next of kin of the said deceased, and one of the persons entitled in distribution to his personal estate and effects in case he shall be pronounced to have died intestate [*or interested under a former will bearing date &c., or as the case may be*], and that the said probate ought to be called in, revoked and declared null and void in law ; NOW THIS IS TO COMMAND YOU, the said that within eight days after service hereof on you inclusive of the day of such service you do bring into and leave in the said Registry of our said Court the aforesaid

probate and further do show cause [if you should think it for your interests so to do], why the said probate should not be revoked and declared null and void in law and the said will [and codicils] pronounced to be null and invalid.

Dated this day of 18 , and in the year of our reign.

(Signed) E. F.,
Registrar.

[Name of practitioner].

Indorsement to be made after service as before.

No. III.]

CITATION TO BRING IN ADMINISTRATION.

In Her Majesty's Surrogate Court for the County of

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith :

To of in the County of

Whereas it appears by an affidavit (a) of A. B. of , sworn on and filed in the registry of our said Surrogate Court that late of deceased, died on at and that on the letters of administration of the personal estate, and effects of the said deceased on the suggestion that he had died intestate were granted to you by the authority of our said Surrogate Court as the and next of kin of the said deceased and as has since been discovered that the said made and duly executed his last will and testament, dated and thereof appointed executors [*or as the case may be*] and that the said letters of administration ought to be called in, revoked and declared null and void in law ; NOW THIS IS TO COMMAND YOU, the said that within eight days after service hereof on you, inclusive of the day of such service, you do bring into, and leave in the registry of our said Court the said letters of administration, and further do show cause, if you should think it for your interest so to do, why the same should not be revoked and declared null and void.

Dated this day of 18 , and in the year of our reign.

E. F.,
Registrar.

Citation to bring in administration.

[Name of practitioner.]

Indorsement as before.

(a) The affidavit should be made by the plaintiffs or one of them.

No. IV.]

CITATION TO SEE PROCEEDINGS.

In her Majesty's Surrogate Court of the County of

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain
and Ireland, Queen, Defender of the Faith :

To of in the County of

Whereas it appears by an affidavit (a) of sworn on the day
of 18 , and filed in the registry of our said Surrogate Court that
there is now depending in our said court a cause entitled A. B. v. C. D.,
wherein the said is proceeding to prove, in solemn form of law, the
alleged last will and testament with codicils thereto of Andrew Mer-
cer, late of deceased, who died on or about the day of at .

And whereas it appears by the said affidavit that you are the natural
and lawful and one of the next of kin of the deceased, and a party
entitled in distribution to the personal estate and effects of the deceased
in case he should be pronounced to have died intestate [*or interested under
a former will of the said deceased bearing date, &c., or as the case may be.*]

Now THIS IS TO GIVE NOTICE TO YOU, the said
to appear in the said cause, either personally or by your solicitor or at-
torney, should you think it for your interest so to do, at any time during
the dependence of the said cause, and before final judgment shall be given
therein ; and take notice that in default of your so doing, the judge of
our said court will proceed to hear the said will [and codicils] proved in
solemn form of law, and pronounce judgment in the said cause, your ab-
sence notwithstanding.

Dated this day of , and in the year of our reign

E. F.,

Citation to see proceedings.

Registrar.

[Name of practitioner].

Indorsement as before.

No. v.]

PRÆCIPE FOR CITATION.

In Her Majesty's Surrogate Court of the County of

Citation [or, citation to see proceedings] for A. B. against C. D. in a
matter of proving in solemn form of law the last will and testament with

(a) This affidavit must be made by the party on whose behalf the citation is ex-
tracted.

If heir-at-law recite briefly the order on motion.

P. A.

(or A. B. in person). [Add an address within three miles of the general post office].

Dated the day of 18 .

FORM OF APPEARANCE.

A. B. plaintiff,
against
C. D., defendant. } E. F., of the &c., attorney for the defendant,
C. D., of &c., who is the lawful child and only
next of kin or, [as the case may be setting forth
interest], of the said deceased, who intends to oppose the grant of probate
[or administration], for which application has been made herein, appears
for him.

*Attorney for the said C. D.**

Entered the day of A.D. 18 (Add Address, &c.)

* If the defendant appears in person, then *mutatis mutandis*.

DECLARATION.

A. B. [or A. B. by C. D. his solicitor or attorney] saith that Andrew Mercer, late of deceased, who died on or about the day of 18 , at being of the age of twenty-one years and upwards made his last will and testament, with codicils thereto bearing date, to wit, the said will on the day of 18 , the first of the said codicils on the day of 18 , [and so on for any other codicils] and in the said will appointed the said A. B. sole executor [or as the case may be] that the said will and codicils respectively after having been reduced into writing, were signed by the said testator [or signed by G. H. in the presence, and by the direction of the testator, or signed by the testator, who acknowledged his signature thereto, or as the case may be] in the presence

of two witnesses present at the same time, and who subscribed the same in the presence of the said testator, and whose names severally appear upon the said will and codicils, and that the said testator was at the time of the execution of the said will and codicil respectively of perfect sound mind, memory, and understanding.

NOTICE WHERE THE DEFENDANT APPEARS.

The defendant must plead hereto in eight days from the date hereof, otherwise the plaintiff will proceed to obtain probate of the said will and codicil [*or, as the case may be*].

No. VIII.] DECLARATION IN AN INTEREST CAUSE.

In Her Majesty's Surrogate Court of the County of

The day of 18 ,

A. B. [*or A. B. by C. D. his solicitor, or attorney*], saith that Andrew Mercer, late of deceased, died on or about the day of at intestate [*or, as the case may be*], a widower without child, parent, brother, or sister, uncle, aunt, nephew or neice, leaving the said to A. B., his lawful cousin german, and one of his next of kin (*or, as the case may be*).

NOTICE.

The defendant must plead hereto in eight days from the date hereof, otherwise the plaintiff will proceed to obtain letters of administration of the personal estate and effects of the deceased [*or, as the case may be*].

No. IX.] FORM OF DEMURRER.

In Her Majesty's Surrogate Court of the County of

The day of 18 ,

A. B. or C. D.

The defendant, his solicitor, or attorney [*or "in person, &c.," or "plaintiff"*] says that the declaration [*or "plea, &c."*] is bad in substance.



No. X.] PLEA IN TESTAMENTARY CAUSE.

In Her Majesty's Surrogate Court of the County of

The day of 18 ,

G. H. [*or G. H. by K. L. his solicitor or attorney*] saith that the paper writing bearing date the day of 18 , and alleged by the

plaintiff to be the last will and testament of Andrew Mercer, late of in the County of deceased [or the first or any other codicil thereto,] was net executed according to the provisions of the Wills Act of Ontario, (or, that Andrew Mercer, the deceased in this cause at the time his alleged will [or codicil] bears date, to wit, on the day of 18 , was not of sound mind, memory, and understanding,) (or any other averment in opposition to the will or codicil propounded.)

No. XI.]

PLEA IN AN INTEREST CAUSE.

In Her Majesty's Surrogate Court, County of

The day of , 18 .

G. H. [or G. H. by J. K., his solicitor or attorney] saith, that A. B., the plaintiff, is not the lawful cousin german of Andrew Mercer, who died on or about the day of 18 , at the deceased in this cause.

And further, that the said deceased died intestate [or as the case may be] a widower, without child, parents, brother or sister, uncle or aunt, nephew or niece, or cousin german, leaving him, the said G. H., his lawful cousin german once removed, and his only next of kin [or, as the case may be.]

No. XII.]

AFFIDAVIT OF SCRIPTS.

In Her Majesty's Surrogate Court of the County of

A. B. v. C. D.

I, A. B., of in the county of , party in this cause, make oath and say, that no paper or parchment writing, being or purporting to be or having the form or effect of a will or codicil, or other testamentary disposition of Andrew Mercer, late of , in the County of , deceased, the deceased in this cause, has at any time either before or since his death come to the hands, possession, or knowledge of me this deponent, save and except the true and original last will and testament of the said deceased, now remaining in the registry of this court [or hereunto annexed, or as the case may be] the said will bearing date the day of , 18 , [or as the case may be,] also save and except [here add the dates and particulars of any other testamentary paper of which the deponent has any knowledge.]

(Signed) A. B.

Sworn at on the day of , 18 , before me,

[Person authorized to administer oaths under the Act.]

N.B.—All papers answering the description given in C. R. 19 post, which

If any such papers are known to be in the possession or under the control of any other person, the description and the name and address of such other person should also be set forth.

THE ISSUE.

A. B., by P. Q., his proctor, solicitor, or attorney, [or in person] did deliver, to wit, on the day of 18 to the said C. D., his declaration in the words and figures following :

Whereupon the said C. D. did deliver, to wit, on the day of
to the said A. B., his plea, in the words and figures following :

[Add any further pleadings.]

NOTICE AS TO MODE OF TRIAL

Take notice, that after the expiration of eight clear days from the service hereof the $\left\{ \frac{\text{plaintiff}}{\text{defendant}} \right\}$ in this cause intends to apply to the court to try the question at issue before itself [or by a common jury before itself], [or to direct an issue to be tried before the judge of _____ by a common jury at the next _____ to be holden in and for the County of _____], [or as the case may be].

$$\left\{ \begin{array}{cc} \mathbf{A.} & \mathbf{B.} \\ \mathbf{C.} & \mathbf{D.} \end{array} \right\}$$

for

$$\left\{ \begin{array}{cc} \text{A.} & \text{B.} \\ \text{C.} & \text{D.} \end{array} \right\}$$

No. xv.]

RECORD.

In Her Majesty's Surrogate Court of the County of

This day of 18 .

A. B. vs. C. D.

A. B. by E. F., his solicitor or attorney [or in person] having cited C. D. to appear in support of any interest he may have in the estate and effects of Andrew Mercer [or according to the term of citation], [or A. B. by E. F., his solicitor or attorney (or in person), having warned the caveat entered by C. D. in the estate and effects of Andrew Mercer], late of , deceased, who died on or about the day of 18 , at , the said C. D. appeared thereto personally [or by his solicitor or attorney], whereupon to wit, on the day of 18 , did deliver his declaration to the said , in the words and figures following : [*Here insert declaration at length.*]

Whereupon the said did deliver to wit, on the day of to the said his plea in the words and figures following :

[*Here insert at length plea and any further pleadings.*]

Therefore, claimed that the cause should be tried as the Court should direct.

Whereupon the judge did order as follows [*here set forth the direction as to the mode of hearing or trial*] :

No. xvi.]

RECORD IN CASE OF PARTIES CITED NOT APPEARING.

In Her Majesty's Surrogate Court of the County of

This day of 18 .

A. B. vs. C. D.

A. B. by E. F., his solicitor or attorney [or in person], having cited C. D. to appear in support of any interest he may have in the estate and effects of Andrew Mercer [or according to the terms of the citation], late of , deceased, who died on or about the day of , at , the said C. D. did not in any wise appear thereto : Whereupon in default of appearance of the said C. D., the said A. B. did file his declaration in the Registry, in the words and figures following : [*Here insert the declaration at length.*]

Therefore, A. B. claimed that the cause should be tried as the Court should direct ; whereupon the judge did order as follows : [*Here set forth the direction as to the mode of trial.*]

FORM OF QUESTIONS TO THE JURY.

A. B. vs. C. D.

SUBPOENA AD TESTIFICANDUM.

SUBPOENA DECES TECUM.

And also that you bring with you, and produce at the time and place aforesaid [here describe shortly the deeds, letters, papers, &c., required to be

produced], then and there to testify and show all and singular those things which you or either of you know or the said deed or instrument doth import of and concerning a certain cause or proceeding now in our said court before our said judge depending, between plaintiff and defendant, [or a certain cause or proceeding now in our said court before our said judge depending, in default of appearance of parties cited, entitled ,] on the part of the [plaintiff or defendant, or as the case may be], and at the aforesaid day between the parties aforesaid to be heard or tried. And this you nor any of you shall in nowise (*concluded as in preceding form*).

No. xx.] PRÆCIPÉ FOR SUBPÆNA AD TESTIFICANDUM.

In Her Majesty's Surrogate Court of the County of

A. B. vs. C. D.

Subpœna for to testify between A. B. plaintiff and C. D. defendant, on the part of the plaintiff [or defendant], the day of 18 .

(Signed) P. A.
Plaintiff's Solicitor.

No. xxl.] PRÆCIPÉ FOR SUBPÆNA DUCES TECUM.

In Her Majesty's Surrogate Court of the County of

A. B. vs. C. D.

Subpœna for to testify and produce, &c., between A. B. plaintiff and C. D. defendant, on the part of the plaintiff [or defendant], the day of 18 .

(Signed) P. A.
Plaintiff's Solicitor or Attorney.

No. xxil.] NOTICE TO ADMIT DOCUMENTS.

In Her Majesty's Surrogate Court of the County of

A. B. vs. C. D.

Take notice, that the { plaintiff / defendant } in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the { defendant / plaintiff } at on between the hours of and the { defendant / plaintiff } is hereby required, within forty-eight hours

from the last-mentioned hour, to admit that such of the said documents as specified to the originals were respectively written, signed or executed as they purport respectively to have been, that such as are specified to be copies are true copies, and such documents as are stated to have been served, sent or delivered were so served, sent or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in the cause. Dated, &c.

To { A. B. } or to E. F., attorney or solicitor } defendant.
 { C. D. } or agent for } plaintiff.
 (Signed) { C. D. } or G. H., attorney or solicitor } plaintiff.
 { A. B. } or agent for } defendant.

[Here describe the documents in the common law counts.]

NO. XXIII.] SUBPENA TO A WITNESS TO BE EXAMINED TOUCHING A TESTAMENTARY PAPER OF WHICH HE IS SUPPOSED TO HAVE KNOWLEDGE.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To of , GREETING :

We command you, that, all other things set aside, and ceasing every excuse, you do appear before A. B., the judge of our said Surrogate Court at on the day of 18 , by of the clock in the forenoon of the same day, and so from day to day until you be dismissed by our said judge, to testify to the truth according to your knowledge [or to answer to certain interrogations to be administered to you], touching a certain paper, writing, or script, being, or purporting to be testamentary, to wit : [*here describe the script and give its date as accurately as possible*], of which said paper, writing, or script, reasonable grounds have been furnished to our said judge for believing that you have knowledge. And this you shall in no wise omit, under the penalty of

Witness [*insert the name of the judge*], at the Surrogate Court, the day of 18 , in the year of our reign.

E. F.,
Registrar.

[Name of the practitioner and address.]

Indorsement to be made after service.

This subpoena was served by J. K. on the within named on the day of 18 .

(Signed), J. K.

In Her Majesty's Surrogate Court.

Subpoena for W. W. to bring into and leave in the registry of the said Court [here accurately describe the script].

(Signed), { A. B. } or { P. A., plaintiff's [or defendant's] proctor,
 { C. D. } { solicitor, or attorney.

In Her Majesty's Surrogate Court.

(Signed), $\left\{ \begin{array}{c} \text{A. B.} \\ \text{C. D.} \end{array} \right\}$ or $\left\{ \begin{array}{c} \text{P. A. plaintiff's [or defendant's] proctor,} \\ \text{solicitor, or attorney.} \end{array} \right\}$

Afterwards, on the day of 18 , before the Judge of Her Majesty's said Surrogate Court, come the parties within mentioned, by their respective attorneys [or as the case may be] within mentioned, and a jury duly summoned also come, who, being sworn to try the matters in question between the parties, upon their oath say that [state the affirmative or negative of the issue, as found for the plaintiff or defendant, and in the terms adopted in the questions for the jury.]

(Signed), A. B.,
 Registrar.

ENTRY ON THE RECORD OF A JUDGMENT.

(Signed), A. B.,
 Registrar.

INVENTORY.

(Signed) C. D.

(a) As to value see *Bradshaw v. Bradshaw*, 2 Lee, 272.

No. xxix.]

PETITION.

In Her Majesty's Surrogate Court of the County of

A. B. v. C. D. The day of 18 .

A. B. [or E. F. proctor, solicitor, or attorney for A. B.] the plaintiff
says, that

[Here insert all the facts which are to be alleged.]

Wherefore the said A. B. prays, that

[Here end with the prayer of the plaintiff.]

(Signed) A. B. [or E. F., &c.].

xx.]

ANSWER TO PETITION.

In Her Majesty Surrogate Court of the County of

A. B. v. C. D. The day of 18 .

C. D. [or G. A., proctor, solicitor or attorney for C. D.] the defendant
says, that

[Here insert the facts to be alleged in answer].

Wherefore the said C. D. prays, that

[Here insert the prayer of the defendant].

(Signed) C. D. [or G. H].

The reply, rejoinder, &c. (if any such be necessary), are to be followed out in the same form.

No. XXI.]

NOTICE OF APPEAL.

A. B. v. C. D.

Notice is hereby given that the defendant [or plaintiff] in a suit lately depending in Her Majesty's Surrogate Court of &c., entitled A. B. v. C. D., has in due time and place appealed against a certain final order or decree made in the said cause by His Honour the Judge of the said Surrogate Court on the day of 18 ; whereby amongst other things, he did order and decree.

[Here set forth the matters which are the subjects of appeal].

(Signed) C. D. [or G. H., proctor, solicitor
or attorney for C. D., the de-
fendant] or as the case may be.

This **day of** **18** ,

No. xxxii.] BOND TO BE EXECUTED BY A RECEIVER OF REAL ESTATE,
PENDING SUIT.

(Omitted.)

No. xxxiii.] MOTION PAPER.

In the Surrogate Court, County of

Between A. B., plaintiff, and C. D., defendant.

In the goods of Andrew Mercer, deceased.

Andrew Mercer, late of , died on the day of , 18 ,
intestate, without child or parent, leaving the said C. D., his lawful widow
and relict and the said A. B., his natural and lawful brother and only next
of kin.

The said C. D., having deferred taking upon her the administration of
the personal estate and effects of the said deceased, and the said A. B.,
on the day of , extracted a citation, under seal of this Court,
against her, the said C. D., to accept or refuse letters of administration of
the personal estate and effects of the said deceased, or show cause why the
same should not be granted to him, the said A. B.

This said citation was afterwards, viz., on the day of , 18 ,
personally served on the said C. D., and was on the day of ,
18 , returned into this honourable Court.

No appearance has been given to the said citation.

The above averments are proved by affidavits filed.

The Court will be moved by counsel to decree letters of administration
of all and singular the personal estate and effects of the said deceased to
be granted to the said A. B.

(Signed) , Solicitor, &c.

xxxiv.] ORDER ON MOTION FOR MODE OF TRIAL.

In the Surrogate Court of the County of Ontario.

D. T. and I. L., plaintiffs,	}	Upon reading the notice herein to the de- fendant in person of the intention to apply to this Court for the mode of trial of this cause, dated the tenth day of September last, the affidavit of service thereof and the enlargement thereon endorsed, and it having been further
and		
G. Y. S., defendant.		

enlarged into this present term, and on the application of the plaintiff's attorney, and hearing what was alleged by counsel,—it is ordered that the plaintiff herein do proceed with the trial of this cause before a jury at the next December Sittings of the County Court of the County of Ontario, at Whitby ; the record to be entered therefor, and all proceedings herein to be had and taken for such trial at said time and place as may be requisite and necessary.

And it is further ordered that the questions to be submitted to and tried by the said jury, disclosed in the pleadings in this cause, are and shall be as follows :—

1st. Was the paper writing alleged to be the last will and testament of the late M. W., deceased, and dated the second day of August last (A. D. 1873), executed according to the provisions of the Statutes then in force in this Province.

2nd. Was the said M. W., deceased, at the time the said will bears date, to wit, on the said second day of August last (A.D. 1873), of sound mind, memory and understanding.

3rd. Did the said M. W. execute the said will or paper writing last aforesaid not as of her own free will but contrary to her intentions and under a mistake, and under undue influence and collusion.

On motion of Mr. McM., of Counsel for the said plaintiff.

Dated the day of , 18 .

By the Court.

(Signed) J. V. HAM,
Registrar S. C. Ontario.

APPENDIX B.

COSTS IN CONTENTIOUS BUSINESS.

The following items of fees applicable to contentious business are provided for by the S. C. Act, *ante*, 61, viz.:—

PAYABLE TO THE CROWN.

Fees.	On every instrument or process with seal of Court,...	\$0 50
	On every final judgment in contentious or disputed cases,	1 00

TO THE JUDGE.

On every order,	0 50
On every special attendance or attendance for audit, ...	1 00
For every day's sittings in contentious or disputed cases ...	2 00
On evidence, if taken before Judge, per folio,	1 00

Costs were allowed Proctors, Solicitors, and Attorneys practising in the Court of Probate in England in Court and Contentious Business on the following proceedings (a):

The column for fees or charges is left blank. According to the cases before referred to (p. 57 *ante*), if the taxation be under a decree or order of the Surrogate Court, the County Court tariff of fees will be used; i. e. as to matters not otherwise provided for by the S. C. Act or Rules (b).

CITATION.

Citation including præcipe,	
Citation to see proceedings, including præcipe,	

- (a) *Vide* the Jurist & L. J. (N. S.) of 1858, and Horsey's Probate Acts.
 (b) *Vide* section 72, S. C. Act, and note, *ante*, p. 56.

Certificate of service,
 Service of citation, if within two miles of the place of business of
 the practitioner or of the person employed to effect the service,
 If beyond that distance in addition for every mile one way, ...
 Affidavit of service, if three folios of seventy-two words or under,
 If necessarily more than three folios, for every folio, including
 copy,
 In cases in which the person to be served shall avoid service, or
 the service shall be effected beyond the jurisdiction, such a sum
 to be allowed for service as the registrar may consider reasonable
 under the circumstances,

SUBPENA.

Subpoena ad testificandum, including præcipe,
 Subpoena duces tecum, or to bring in a script, if five folios of
 seventy-two words, or under, including præcipe,
 If necessarily exceeding five folios, for each additional folio of
 seventy-two words,
 Service of a subpoena. Same as citation.

WRIT.

Writ of attachment, including præcipe,
 Writ of sequestration, including præcipe,
 Writ of fieri facias, including præcipe,

INSTRUCTIONS.

Instructions for citation, for pleadings, for interrogatories, for spe-
 cial affidavits, or for inventories,
 Ditto to defend suit,
 Ditto for brief, or case for hearing,
 If there are several witnesses and the brief is necessarily long an
 additional fee will be allowed.

PLEADINGS AND COPIES.

Drawing and engrossing declaration, if ten folios of seventy-two
 words or under,
 If exceeding ten folios, for every additional folio,
 Drawing and engrossing pleas, replications, demurrers and other
 pleadings, except those simply joining or taking issue, if ten
 folios of seventy-two words or under,
 If exceeding ten folios, for every additional folio,
 Copies of declaration or other pleading to file, at per folio of
 seventy-two words,

THE ISSUE.

Drawing the issue, if fifteen folios of seventy-two words, or under,
including copy,

If exceeding fifteen folios, per folio, including copy,

THE RECORD.

Engrossing record to file, at per folio of seventy-two words, ...

SPECIAL CASE.

For case for motion, including fair copy for judge,

If necessarily exceeding seven folios of seventy-two words in
length, for every additional folio of seventy-two words, in-
cluding copy,

For case to advise on evidence, including copy for counsel, . .

If the case exceeds ten folios in length, and it is shown that it
could not be used as part of the brief or case for the hearing,
an additional fee will be allowed.

DRAWING INSTRUMENTS.

Drawing any instrument to be filed in or issued by the registry for
which no other fee is herein allowed, and for fair copy to be filed
or issued, per folio of seventy-two words,

PERUSING AND ABSTRACTING.

For perusing and abstracting pleadings, testamentary papers and
exhibits of all kinds, per folio of seventy-two words,

BRIEFS AND CASES FOR HEARING.

For drawing same, per folio of seventy-two words,

For each copy, per folio of seventy-two words,

MAPS AND PLANS.

For maps or plans, each from {

Copies of same, if required, each from }

AFFIDAVITS.

Drawing affidavit :

If five folios of seventy-two words or under, including copy for
the court or registry,

If above five folios, per folio including copy,

INTERROGATORIES.

For drawing the same, at per folio of seventy-two words, and copy
for the court,

COPIES.

For every plain copy of a script, exhibit or other instrument, per folio of seventy-two words,
 If the same or any part thereof are required to be made *fac simile*, for the part or parts copied *fac simile*, in addition to the above, per folio of seventy-two words,

COLLATING.

For collating any copy of a script, exhibit or other instrument with the original, or with another copy thereof, per folio of seventy words, in addition to the fee for attendance,

NOTICES.

All necessary notices, if three folios or under, inclusive of copy and service,
 If necessarily exceeding three folios, for every additional folio,
 In all cases where service of a notice is necessary beyond two miles of the place of business of the practitioner, the same fee as upon the service of a citation.

SUMMONSES.

Drawing summons,
 Copy of summons or order of the judge, and service,

ATTENDANCES.


For attendance on and seeing counsel,
 Attendance on consultation,
 Attendance on conference,
 Attendance in pursuance of notice to admit,
 For every hour after the first,
 Attendance on trial or hearing when cause is on paper and not tried or heard, or on motion in court,
 On trial or hearing,
 If it lasts the whole day,
 Attendance on examination of witnesses under a commission or order :
 If in (England or Wales) Ontario, per diem,
 If elsewhere,
 For all necessary attendances in chambers before the judge or before a commissioner, on counsel, in the registry, or upon the adverse parties or practitioner, for which no other fee is herein allowed,

TERM FEES, LETTERS AND MESSENGERS.

Term fee, letters and messengers, for each term in which any business is done in court or in chambers other than obtaining an order for taxation, or attending the taxation of bills of costs, ...
 For every necessary letter written to any person other than the practitioner's own client,

BILLS OF COSTS.

Drawing bill of costs and copy for taxation, per folio of seventy-two words,
 Copy for the adverse party, per folio of seventy-two words, ..
 Attendance on taxation of bill of costs,
 If necessarily above an hour, for each additional hour or part of an hour,

 If in any court or contentious business it shall become necessary for proctors, solicitors or attorneys to transact any business for which no fee is herein specified, such fee shall be allowed to them as would be allowed for similar business done in the courts of common law and equity. (Coote 4th Ed. 428.)

ALLOWANCE TO WITNESSES. (a)

To witnesses residing within three miles of the Court-house, per diem, \$1 00
 To witnesses residing over three miles from the Court-house, per diem, 1 25
 Barristers and attorneys, physicians and surgeons, when called upon to give evidence, in consequence of any professional service rendered by them, or to give professional opinions, per diem, ... 4 00
 Engineers and surveyors, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, per diem, 4 00
 If the witnesses attend in one cause only, they will be entitled to the full allowance.

If they attend in more than one case, they will be entitled to a proportionate part in each cause only.

The travelling expenses of witnesses, over ten miles, shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed one shilling per mile one way.

SHORT-HAND WRITER.

The Statute of 40 Vict. c. 19, sec. 4, as to short-hand writers, and the rules made by the County Judges under authority of that Act, provide for the attendance of short-hand writers in Surrogate Courts.

(a) Same in Sup. and Co. Courts, *vide* Ewart's Costs; and Chancery Orders of Feb'y 18, 1875.

APPENDIX C.

STATUTES.

PROOF OF WILLS IN ACTIONS AND SUITS (a).

Revised Statutes of Ontario, Chap. 62.

SEC. 41. In any action at law or suit in equity where, according to the existing law, exclusive of the provisions contained in this Act, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, the party intending to establish, in proof, such devise or other testamentary disposition, may give notice to the opposite party ten days at least before the trial or other proceeding in which the said proof is intended to be adduced, that he intends at the said trial or other proceeding to give in evidence as proof of the devise, or other testamentary dispositions, the probate of the will or letters of administration, with the will annexed or a copy thereof, stamped with the seal of the Surrogate Court granting the same, or with the seal of the Court of Chancery where the probate or letters of administration were granted by the former Court of Probate for Upper Canada; and in every such case the probate or letters of administration or copy thereof respectively stamped as aforesaid, shall be sufficient evidence of such will and its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter under "The Surrogate Courts' Act," unless the party receiving such notice, within four days after such receipt, gives notice that he disputes the validity of such devise or other testamentary dispositions.

42. In every case in which, in any such action or suit, the original will is produced and proved, the court or judge before whom such evidence is given may direct by which of the parties the costs thereof shall be paid (b).

(a) *Vide* note to Sec. 4 S. C. Act *ante*.

(b) As to obtaining subpoena to registrar to produce original will. *Vide* note to Sec. 12, S. C. A. *ante*.

A A

43. In case of the death of any person in any of Her Majesty's possessions out of Ontario, after having made a will sufficient to pass real estate in Ontario, and whereby any such estate has been devised, charged, or affected, and in case such will has been duly proved in any court having the proof and issuing probate of wills in any of such possessions, and remains filed in such court, then in case notice of the intention to use such probate or certificate in the place of the original will is given to the opposite party in such proceedings one month before the same is to be so used, the production of the probate of the will, or a certificate of the judge, registrar, or clerk of such court, that the original is filed and remains in the court, and purports to have been executed before two witnesses, shall, in any proceedings in any court of law or equity in Ontario concerning such real estate, be sufficient *prima facie* evidence of such will and the contents thereof, and of the same having been executed so as to pass real estate without production of the original will, but such probate or certificate shall not be used if upon cause shown before any such court or any judge thereof, such court or judge finds any reason to doubt the sufficiency of the execution of such will to pass such real estate as aforesaid, and makes a rule or order disallowing the production of such probate.

44. The production of the certificate in the last preceding section mentioned, shall be sufficient *prima facie* evidence of the facts therein stated, and of the authority of the judge, registrar, or clerk, without any proof of his appointment, authority, or signature.

AN ACT RESPECTING THE PROOF OF PROCEEDINGS IN PROVINCIAL AND COLONIAL COURTS, 43 VICT. C. 7.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

1. Any judgment, decree or other judicial proceeding recovered, made, had or taken in any court of record in any of the Provinces of Canada, or in any British colony or possession, may be proved in any suit, action or proceeding, either at law or equity, in Ontario—by an exemplification of the same—under the seal of the court in which such judgment, decree or other judicial proceeding was recovered, made, had, or taken ; and without any proof of the authenticity of such seal or other proof whatever ; in the same manner as any judgment, decree or similar judicial proceeding of any of the Superior Courts of Common Law or Equity in Ontario may be proved by an exemplification thereof in any judicial or other proceeding in the said last mentioned courts respectively.

FOREIGN JUDGMENTS.

Rev. Stats. Ont. Chap. 62.

Sec. 31. Any judgment, decree, or other judicial proceeding recovered, made, had or taken in the Supreme Court of Judicature in England, or in any of the Superior Courts of Law, Equity, or Bankruptcy, in Ireland or Scotland, or in any Court of Record in Quebec, or in any Court of Record of the United States, or of any State of the United States of America, may be proved in any suit, action or proceeding, either at Law or Equity in Ontario, in which proof of any such judgment, decree or judicial proceeding may be necessary or required, by an exemplification of the same under the seal of the said Courts respectively, without any proof of the authenticity of such seal or other proof whatever, in the same manner as any judgment, decree, or similar judicial proceeding of any of the Superior Courts of Common Law or Equity in Ontario, may be proved by an exemplification thereof, in any judicial or other proceeding in the said last mentioned courts respectively.

NOTARIAL DOCUMENTS.

32. A notarial copy of any notarial act or instrument in writing made in Quebec, before a Notary or Notaries, filed, enrolled, or enregistered by such Notary or Notaries, shall be receivable in evidence in any judicial or other proceeding, either at Law or in Equity in Ontario, in the place and stead of the original, and shall have the same force and effect as the original would have if produced and proved.

33. Such notarial copy may be rebutted or set aside by proof that there is no such original, or that the notarial copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may be by the law of Quebec, taken before a Notary or Notaries, or be filed, enrolled or enregistered by a Notary or Notaries in Quebec.

AFFIDAVITS, &C., MADE OUT OF ONTARIO.

Sec. 38. Oaths, affidavits, affirmations or declarations administered, sworn, affirmed or made out of the Province of Ontario, before any *Commissioner* authorized to administer oaths in the Supreme Court of Judicature in *England*, or before a Judge of the Supreme Court of Judicature in *England*, or of the Court of Session, or the Justiciary Court in *Scotland*, or in the High Court of Chancery, or the Courts of Queen's Bench, Common Pleas, or Exchequer in *Ireland* ;

Or, before a Judge of any of the County Courts in *Great Britain* or *Ireland* within his County, or before any *Notary Public* certified under his hand and official seal ;

Or, before the Mayor or Chief Magistrate of any City, Borough or Town corporate in Great Britain or Ireland ;

Or, in any Colony of Her Majesty without Canada,

Or, in any foreign country, and certified under the common seal of such City, Borough, or Town corporate ;

Or, before a Judge of any Court of Record, or of Supreme Jurisdiction in any Colony without Canada, belonging to the Crown of Great Britain, or any dependency thereof, or in any foreign country ;

Or, if made in the British Possessions in India before any Magistrate or Collector certified to have been such under the hand of the Governor of such possession ;

Or, if made in Quebec before a Judge or Prothonotary of the Superior Court, or Clerk of the Circuit Court ;

Or, before any Consul, Vice-Consul, or Consular Agent of Her Majesty exercising his functions in any foreign place ;

Or, before a Commissioner authorized by the laws of Ontario to take affidavits in and for any of the Courts of Record of the Province, for the purposes of and in or concerning any cause, matter or thing depending, or in any wise concerning any of the proceedings to be had in the said Courts, shall be as valid and effectual and shall be of like force and effect to all intents and purposes as if such oath, affidavit, affirmation or declaration had been administered, sworn, affirmed or made in this Province before a Commissioner for taking affidavits therein, or other competent authority of the like nature.

Sec. 39. Any document purporting to have affixed, impressed or impressed or subscribed thereon or thereto, the signature of any such Commissioner, or the signature and official seal of any such Notary Public or Prothonotary, or the seal of the Corporation and the signature of any such Mayor, or Chief Magistrate, or Governor as aforesaid, or the seal and signature of any such Judge, Consul, Vice-Consul, or Consular Agent in testimony of any such oath, affidavit, affirmation or declaration having been administered, sworn, affirmed or made by or before him, shall be admitted in evidence without proof of any such signature, or seal and signature, being the signature or the seal, and signature of the person whose signature, or seal and signature the same purport to be, or of the official character of such person.

THE WILLS ACT.

Rev. Stats. Ont., Chap. 106.—An Act respecting Wills.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :

1. This Act may be cited as "*The Wills Act of Ontario.*"

WILLS BEFORE 1ST JANUARY, 1874.

Land.

2. In the three next succeeding sections of this Act, numbered three to five inclusive, the word "land" shall extend to messuages and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties, or any of them, and to any estate of inheritance or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency. C. S. U. C. c. 82, s. 14.

3. Where a will made before and not re-executed, republished or revived after the first day of January, one thousand eight hundred and seventy-four, by any person dying after the sixth day of March, one thousand eight hundred and thirty-four, contains a devise in any form of words of all such real estate as the testator dies seised or possessed of, or of any part or proportion thereof, such will shall be valid and effectual to pass any land acquired by the devisor after the making of such will, in the same manner as if the title thereto had been acquired before the making thereof. C. S. U. C. c. 82, s. 11; see 36 V. c. 20, ss. 2 and 46.

4. Wherever land is devised in any such will as aforesaid, it shall be considered that the devisor intended to devise all such estate as he was seised of in the same land, whether in fee simple or otherwise, unless it appears upon the face of such will that he intended to devise only an estate for life, or other estate less than he was seised of at the time of making the will containing such devise. C. S. U. C. c. 82, s. 12; see 36 Vic. c. 20, ss. 2 and 46.

5. Any will affecting land executed after the sixth day of March, 1834, and before the first day of January, 1874, in the presence of and

attested by two or more witnesses, shall have the same validity and effect as if executed in the presence of and attested by three witnesses ; and it shall be sufficient if such witnesses subscribed their names in presence of each other, although their names were not subscribed in presence of the testator. C. S. U. C. c. 82, s. 13. See 36 Vic. c. 20, ss. 2 and 46.

6. After the fourth day of May, 1859, and before the first day of January, 1874, every married woman might, by devise or bequest executed in the presence of two or more witnesses, neither of whom was her husband, make any devise or bequest of her separate property, real or personal, or of any rights therein, whether such property was acquired before or after marriage, to or among her child or children issue of any marriage, and failing there being any issue, then to her husband, or as she might see fit, in the same manner as if she were sole and unmarried. C. S. U. C. c. 73, s. 16.

WILLS AFTER 1ST JANUARY, 1874.

7. Unless herein otherwise expressly provided, the subsequent sections of this Act shall not extend to any will made before the first day of January, one thousand eight hundred and seventy-four, but every will re-executed or re-published, or revived by any codicil, shall, for the purposes of the said sections, be deemed to have been made at the time at which the same shall be so re-executed, re-published, or revived. 36 Vic. c. 20, s. 2

8. The twentieth, twenty-first, twenty-second, twenty-fifth and twenty-sixth sections of this Act shall not apply to the will of any person who was dead before the first day of January, one thousand eight hundred and sixty-nine, but shall apply to the will of every person who has died since the thirty-first day of December, 1868, or who dies after the passing of this Act. 32 V. c. 8, s. 6.

9. In the construction of the sections numbered ten to thirty-eight inclusive, in this Act ;

(1) "Will" shall extend to a testament, and to a codicil, and to an appointment by will, or by writing in the nature of a will, in exercise of a power, and also to a disposition by will and testament, or devise of the custody and tuition of any child, by virtue of the Act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards, and liveries and tenures *in capite*, and by knight's service and purveyance, and for settling a revenue upon His Majesty in lieu thereof," and to any other testamentary disposition ;

(2) "Real Estate" shall extend to messuages, lands, rents and hereditaments, whether freehold or of any other tenure, and whether corporeal

incorporeal or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein ;

(3) "Personal Estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estate), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein ;

(4) "Person" and "Testator," shall include a married woman ;

(5) "Mortgage" shall include any lien for unpaid purchase money, and any charge, incumbrance, or obligation of any nature whatever upon any lands or tenements of a testator or intestate. 36 V. c. 20, s. 4 ; 35 V. c. 15, s. 2.

10. Every person may devise, bequeath, or dispose of by will, executed in manner hereinafter mentioned, all real estate and personal estate which he may be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon his heir at law, or upon his executor or administrator ; and the power hereby given shall extend to estates *pur autre vie*, whether there be or be not any special occupant thereof, and whether the same be a corporeal or incorporeal hereditament ; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator be or be not ascertained as the person or one of the persons in whom the same may respectively become vested, and whether he may be entitled thereto under the instrument by which the same were respectively created, or under any disposition thereof by deed or will ; and also to all rights of entry for conditions broken and other rights of entry, and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will. 36 V. c. 20, s. 5.

11. No will made by any person under the age of twenty-one years shall be valid. 36 V. c. 20, s. 6.

12. No will shall be valid unless it is in writing, and executed in manner hereinafter mentioned ; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction ; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator ; but no form of attestation shall be necessary ;

(2) Every will, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, shall be deemed

to be valid, within the meaning of this Act, if the signature is so placed, at, or after, or following, or under, or beside, or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will : and no such will shall be affected by the circumstance that the signature does not follow or is not immediately after the foot or end of the will, or by the circumstance that a blank space intervenes between the concluding word of the will and the signature, or by the circumstance that the signature is placed among the words of the *testimonium* clause, or of the clause of attestation, or follows, or is after or under the clause of attestation either with or without a blank space intervening, or follows, or is after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature is on a side, or page, or other paragraph or disposing part of the will is written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side of the page or other portion of the same paper on which the will is written to contain the signature, and the enumeration of the above circumstances shall not restrict the generality of the above enactment ; but no signature under this Act shall be operative to give effect to any disposition or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature was made. 36 V. c. 20, s. 7.

13. No appointment made by will, in exercise of any power, shall be valid, unless the same is executed in manner hereinbefore required : and every will executed in manner hereinbefore required, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it has been expressly required that a will made in exercise of such power shall be executed with some additional or other form of execution or solemnity. 36 V. c. 20, s. 8.

14. Any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the passing of this Act. 36 V. c. 20, s. 9.

15. Every will executed in manner hereinbefore required shall be valid without any other publication thereof. 36 V. c. 20, s. 1.

16. If any person who attests the execution of a will is, at the time of the execution thereof, or becomes at any time afterwards, incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid. 36 V. c. 20, s. 11.

17. If any person attests the execution of any will, to whom, or to whose wife or husband, any beneficial devise, legacy, estate, interest, gift, or appointment of, or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), is thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will (a). 36 V. c. 20, s. 12.

18. In case by any will, any real or personal estate is charged with any debt or debts, and any creditor, or the wife or husband of any creditor whose debt is so charged, attests the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof. 36 V. c. 20, s. 13.

19. No person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof. 36 V. c. 20, s. 14.

20. Every will shall be revoked by the marriage of the testator, except a will made in the exercise of a power of appointment, where the real or personal estate thereby appointed would not, in default of such appointment, pass to the testator's heir, executor or administrator, or the person entitled as the testator's next of kin under the Statute of Distributions. 32 V. c. 8, s. 3; 35 V. c. 15, s. 3; 36 V. c. 20, s. 15. (*See section eight of this Act.*)

21. No will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances. 32 V. c. 8, s. 4; 36 V. c. 20, s. 16. (*See section 8 of this Act.*)

22. No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed or by the burning, tearing, or otherwise destroy-

(a) A devise by a testatrix, who died in 1860, to a married woman, whose husband was one of the two witnesses to the execution to the will, was held void, notwithstanding the provisions of the Evidence Act of 1852 (16 Vic. ch. 19). (*Crawford v. Boyd*, 22 Gr. 398.

ing the same, by the testator, or by some person in his presence and by his direction, with the intention of revoking the same. 32 V. c. 8, s. 5, 36 V. c. 20, s. 17. (See section 8 of this Act.)

23. No obliteration, interlineation or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration are not apparent, unless such alteration is executed in like manner as hereinbefore is required for the execution of the will ; but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses are made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will. 36 V. c. 20, s. 18.

24. No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same ; and where any will or codicil which has been partly revoked, and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as was revoked before the revocation of the whole thereof, unless an intention to the contrary is shewn. 36 V. c. 20, s. 19.

25. No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, except an act by which such will is revoked as aforesaid, shall prevent the operation of the will with respect to such estate, or interest in such real or personal estate, as the testator had power to dispose of by will at the time of his death. 32 V. c. 8, s. 2 ; 36 V. c. 20, s. 20. (See section 8 of this Act).

26. Every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will. 32 V. c. 8, s. 1 ; 36 V. c. 20, s. 21. (See section 8 of this Act.)

(Sections as to construction.)

27. Lapsed devise to sink into residuary devise. (Imp. Act. 1 V. c. 26, s. 25.)

28. Leaseholds, when may pass under a general devise. (Imp. Act, 1b. s. 26.)

29. General gift to include realty and personalty, over which testator had power to appoint. (Imp. Act, *Ib.* s. 27.)

30. General devise to pass whole estate in the land devised. (Imp. Act, *Ib.* s. 28.)

31. Import of words "die without issue," or to that effect. (Imp. Act, *Ib.* s. 29. Proviso.)

32. When devise to trustee or executor shall pass whole estate of testator. (Imp. Act, *Ib.* s. 30.)

33. When devise to a trustee shall pass the whole estate beyond what is required for the trust. (Imp. Act, *Ib.* s. 31.)

34. When devise of estates tail shall not lapse. (Imp. Act, *Ib.* s. 32.)

35. Gifts to issue who leave issue on testator's death, shall not lapse. (Imp. Act, *Ib.* s. 33.)

36. Mortgage debts to be primarily chargeable on the lands. (Imp. Act, 17-18 V., c. 113. Proviso.)

37. Consequence of direction that testator's debts be paid out of personalty. (Imp. Act, 30-31 V., c. 69, s. 1.)

38. Acts repealed.

Rev. Stat. Ont., Chap. 60.

AN ACT RESPECTING THE ADMINISTRATION BY THE CROWN OF THE ESTATE OF INTESTATES IN CERTAIN CASES.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

1. So often as the Lieutenant-Governor, by a warrant under his privy seal, is pleased to direct Her Majesty's Attorney-General for Ontario, for the time being, to apply for and obtain letters of administration (whether general or limited) of the personal estate and effects of any person dying intestate, or intestate as to some part of his estate, where, in respect of the interest of Her Majesty in such estate and effects, such administration may be rightfully granted to a nominee of Her Majesty, it shall be lawful for any competent Court in this Province, upon application, in pursuance of such warrant, to grant, by the name of office of such Attorney-General, administration accordingly to the said Attorney-General and his successors in the office of Attorney-General for Ontario, for the use and benefit of Her Majesty. 36 V. c. 21, s. 1.

2. When any person dies in this Province intestate, either in whole or in part, and without leaving any known relatives living within the Province, or any known relatives, who can be readily communicated with, living elsewhere, the Lieutenant-Governor may (if he thinks fit), by warrant under his privy seal, direct the Attorney-General for the Province of Ontario, for the time being, to apply for and obtain letters of administration, whether general or limited, of the personal estate and effects of any such person ; and it shall be lawful for any competent Court of this Province, upon application, in pursuance of such warrant, to grant administration accordingly to the said Attorney-General by his name of office, and his successors in the office of Attorney-General for Ontario, for the use and benefit of Her Majesty or of such persons as may ultimately appear to be entitled thereto. 40 V. c. 4, s. 1.

3. In any of such cases, the administration so granted, and the office of administrator under the grant, with all the estates, rights, duties and liabilities of such administrator, shall, upon the death, resignation or removal of the Attorney-General for Ontario, for the time being, devolve upon and become vested and continue in the succeeding Attorney-General, by virtue of his appointment, and so in perpetual succession, without any further grant of administration, or any assignment or transfer of the estates of the administrator ; and all actions, suits, informations, and other proceedings whatever at law or in equity, by or against the Attorney-General, for the time being, as such administrator at the time of his death, resignation, or removal, shall continue, and may be proceeded with, by, in favour of and against the succeeding Attorney-General, in like manner ; saving always, the effect of every limitation in duration or otherwise under the terms of the grant of any such administration, and saving to every Court having jurisdiction in this behalf all such right and authority to revoke or repeal any such administration as such Court would have had during the continuance of a like administration granted to a nominee of Her Majesty in case this Act had not been passed. 36 V. c. 21, s. 2 ; See 40 V. c. 4, s. 2.

4. It shall not be necessary for the said Attorney-General for the time being applying for or obtaining grants of administration, to the use or benefit of Her Majesty, to enter into, or cause to be entered into, any bond to the Judge of the Surrogate Court, commonly called an administration bond ; but the Attorney-General for Ontario, for the time being, shall, in relation to every such administration, be subject to all the liabilities and duties imposed on an administrator by the condition of the bond prescribed by the Rules and Orders now in force, or hereafter made, under "*The Surrogate Courts Act.*" 36 V. c. 21, s. 3.

5. Where administration is granted to the Attorney-General of Ontario

under this Act, the Lieutenant-Governor in Council may direct the sale, either by public auction or private sale, of any real estate in Ontario (including any interest in any such real estate) to which the intestate died entitled; and the said Attorney-General shall thereupon be authorized to sell in accordance with the directions of any Order in Council in that behalf, the whole, or any part of the real estate aforesaid, and to convey the same to the purchaser or purchasers; and every such conveyance by the Attorney-General or his successor in office as aforesaid shall be as valid and effectual as if the deceased were alive at the time of the making thereof, and had executed the same, but shall not have any further validity. 40 V. c. 4, s. 3.

6. In case subsequently to the grant of administration under this Act it is alleged or ascertained that the deceased has relatives, or did not die intestate, the Attorney-General for Ontario may, if he thinks fit, exercise, subject to the discretion of the Lieutenant-Governor in Council, all or any of the powers by this Act conferred, until some person, or persons, is, or are, appointed by some Court or Courts of competent jurisdiction to deal with the real estate of the deceased; and, notwithstanding any such appointment, any sale made in pursuance of this Act may be completed by the execution by the Attorney-General of a conveyance; and until the revocation of the letters granted, the Attorney-General may exercise fully all the powers vested in him as administrator of the personal estate of the deceased. 40 V. c. 4, s. 4.

7. In any case where administration is taken out under the provisions of this Act, the Attorney-General may apply to the Court of Chancery for an order for the making of such enquiries as may be necessary to determine whether or not Her Majesty is entitled to any portion of the real or personal estate of the deceased on account of the deceased dying intestate and without heirs or next of kin, or otherwise. Any decree made upon such enquiry shall, unless reversed on appeal, be final and conclusive. 40 V. c. 4, s. 5.

8. Moneys realized from estates to which the Attorney-General is administrator under this Act, shall be kept in a separate account in such bank, or invested in such manner, as the Lieutenant-Governor may from time to time appoint, and all moneys which have been unclaimed for ten years shall, from time to time, be paid into the Consolidated Revenue Fund of Ontario. 40 V. c. 4, s. 6.

9. Any person proving his title to any such moneys shall be entitled to receive the same, with interest at such a rate as the Lieutenant-Governor may, having regard to the rate realized therefrom, from time to time direct. 40 V. c. 4, s. 7.

10. Any one claiming to be entitled to any such estate, or to any interest therein, or to any part of the proceeds thereof, may apply to the Court of Chancery upon petition for an order or decree, declaring his rights in respect thereto; and the said Court may, thereupon, order such enquiries as may be necessary to determine the same, and may finally adjudicate thereupon; but no application under this section shall be entertained unless security or costs is given by the applicant in case the Attorney-General thinks fit to demand the same. 40 V. c. 4, s. 8.

11. The Attorney-General may deduct from any moneys received on account of any estate all disbursements made by him in respect to any inquiries which he may have considered it expedient to make before taking out administration, as well as all disbursements otherwise made by him in respect of such estate. 40 V. c. 4, s. 9.

APPENDIX D.

PRACTICAL DIRECTIONS.

The following Directions (in accordance with the practice of the English Court of Probate), though not of Authority as Rules of Court in Ontario, are in practice generally followed :—

FOR DESCRIBING TESTATORS OR INTESTATES AND PARTIES APPLYING FOR
PROBATE AND ADMINISTRATION.

As a general rule the signature of a testator is to be adopted as his name although it differ from the name written in the heading of the will.

In case of a variation between the name of the testator in the heading of the will, and the name signed at the foot, or end of it, if the former is the more correct of the two, the testator should be described by the name signed, the word "otherwise" followed by the name given to him in the will being added.

If the testator's name is wrongly spelt in the will, and the will is signed by his initials or by a mark, he should be described by his correct name, the word "otherwise" followed by the name written in the will being added.

If the testator is described in the will as "the elder," but has not so subscribed, such description is not to be inserted.

If the testator is described in the will as "the younger," but does not so subscribe, he should, notwithstanding, be described as "the younger," or "*heretofore* the younger," as the case may be.

The testator's place of residence, stated in the will or codicil, must form part of his description, and any previous or subsequent residence may be added, provided that not more than three places of residence be inserted.

When there is one executor or executrix only named in the will, he or she should be described as "the sole executor" or "the sole executrix."

When there are more executors than one, if they are all females, they are to be described as "the executrices." If they are all males, or partly males and partly females, they are to be described as "the executors."

If the name of an executor or executrix is mis-spelt in the will, the words "in the will written" should be added to his or her correct name,

and if the two names be identical in sound, no proof of identity is required.

If an executor be wrongly described in the will as "the elder," or "the younger," or by a wrong Christian name, an affidavit is required in proof of the identity of the person intended, whether he be the executor applying for the grant, or an executor to whom power is to be reserved.

Whenever it appears by the will that an executor or executrix is related to the testator as father, mother, grandfather, grandmother, son, daughter, grandson, granddaughter, brother, sister, uncle, aunt, great uncle, great aunt, nephew, niece, great nephew, great niece, he or she is to be so described.

Occasionally even greater particularity is used. If a testator describe an executor as "his nephew A., son of his brother B.," that executor must designate himself such in the oath.

Persons applying for administration are to be described in the oaths as follows:

A husband as "the lawful husband."

A wife "the lawful widow and relict."

A father "the natural and lawful father and next of kin."

A mother.... "the natural and lawful mother and only next of kin."

A child..... "the natural and lawful and only child, and only next of kin," or "one of the natural and lawful children and next of kin."

A brother .. "the natural and lawful brother."

A sister "the natural and lawful sister."

If there be no parents parents living, the brother or sister is further to be described as "one of the next of kin" or the "only next of kin."

A nephew.... "the lawful nephew," } and "one of the"

A niece..... "the lawful niece." } or "only next of kin."

If a brother or sister be living, and the nephew or niece, being the child of a brother or sister of the intestate, who died in his lifetime, apply for administration, he or she is to be described as "one of the persons entitled in distribution to the personal estate and effects of the deceased."

A grandparent, grandchild, cousin, &c., is to be described as "lawful," and "one of the next of kin," or "only next of kin."

This particularity of description is not used in all cases, though the grantee be as near in kindred as any of those before designated, *e. g.* an executor being the testator's great-grandfather is not required to be so described in the oath. Persons further removed in relationship than those just mentioned, *e. g.* cousins of any degree, are also not so described.

OTHER MATTERS OF DETAIL.

The instructions, E. C. P. of 4th April, 1862 (8 Jur. N. S. pt. 2, 206; Coote 8th ed. 415), as to personal applications for grants of probate or letters of administration, are not in force under the general rule of practice in the Surrogate Courts, though certain of them would, doubtless, be very beneficial.

The following matters of detail in practice in the Registries may be noticed, being in accordance with the E. C. P. practice (*b*).

Filling up Grants.—All probates or letters of administration, or guardianship, are filled up in the registry.

Identity of Parties.—In cases where the Court may deem it necessary it will require proof, in addition to the oath of the executor or administrator, of the identity of the deceased, or of the party applying for the grant.

Marking Will.—In proving wills the executor and the commissioner or other person who has administered the oath will severally *mark* the will and codicils by signing their names upon those documents.

This *marking* is made either under an exhibit or without one.

Delay to be explained.—If three years have elapsed since the death of the testator, a certificate signed by the party and his proctor or solicitor, or by the proctor or solicitor alone, if the facts are within the knowledge of the latter, may be required in explanation of the delay.

If the certificate be not satisfactory, an affidavit is required.

Will Engrossed, &c.—If there be alterations in the will or codicil, and these alterations are verified by a reference in the attestation clause, or are shown by affidavit to have been made before the execution of the will or codicil, the will or codicil is engrossed fair, the alterations being incorporated, *i. e.*, words interlined or interpolated, being inserted in the text, and words struck through being omitted.

But where no evidence can be given to prove that the alterations were made before the execution of the will or codicil, or where evidence is given that the alterations were made after the execution of the will or codicil,

(a) *Vide* Coote, 3rd Ed. 395; and 8th Ed. 452; and Chadwick's Examples of Administration Bonds, "Supplementary Notice."

(b) Coote 3rd ed. 192 and 8th ed. 239. *et seq.*

the consequence in either case is, as we have seen, that the alterations are excluded from probate, and the following practice is adopted.

A copy of the will or codicil, as in its original state, i. e., before the alterations were effected, is made by the practitioner, and is by him handed to the proper officer for collation.

Fees are charged upon this copy for collating it, including the registrar's certificate in verification thereof.

Upon this copy the following fiat is endorsed :—" Let probate of the will pass as contained in this copy." The will is engrossed in accordance with the copy.

Incorporation.—As an incorporated document or paper is to be proved as part of the will which has incorporated it, such document or paper must be engrossed and registered in its entirety.

In such a case the will will have been previously sworn to as being " contained in paper writings marked A. and B."

To this there is one exception.

If another will, which has been proved, be incorporated, it is not engrossed and registered with the incorporating will if the executor of each will is the same person.

And the same exception applies, as there is the same ground of privity, in cases where the testator, being himself the executor of the incorporated will, has transmitted *per catenam* the representation to his own executor.

In each of these cases an affidavit of the fact is made by the executor, and is engrossed and registered instead of a copy of the incorporated will.

Sureties.—In the case of an application for letters of administration, * * * care should be taken by the practitioner that the sureties offered by an administrator are *responsible* persons.

All females being spinsters and widows are accepted.

Double Probate.—In the case of a double probate or cessate probate the executor may be either sworn to and mark the original will, or the probate which was granted of it.

If the executor adopt the first-mentioned course, he must attend in the registry and be sworn to his oath and affidavit before the registrar.

In this case the original will must be looked up. A fee is paid for the *search* of this.

In the other case, viz., that of being sworn to the probate, the executor may be sworn before any person duly qualified to administer oaths.

In this case the probate is impounded excepting in the case of a double probate, where the grantee of the first probate is alive, when it will be delivered out to the practitioner after the second grant has passed the seal, an examined copy of it being filed.

The executor may in all cases be sworn to and mark an office copy of the will under seal of the court for filing.

If the original will was proved in the former Court of Probate, U. C. the engrossment of the will for a double or cessate probate is bespoken, by the practitioner, of the Surrogate Clerk.

Alteration in Grant.—In the case of an alteration in a grant, the practitioner having obtained an order for making the alteration in the grant, the original act must be looked up for the purpose of the notation, and a search fee is paid for so doing.

The same proceeding is followed in the case of a renunciation made after probate by an executor to whom power has been reserved, and the same stamps are charged.

Motions.—In the case of moving the Court for a grant, the practitioner will deposit with the Registrar the affidavit or affidavits necessary for the support of his motion.

With the affidavits he will file a concise statement of facts for the instruction of the judge.

The affidavit and motion paper must, by the E. C. P. practice, be deposited, before two o'clock p.m. on the fourth day before a day named for motions, and on which the proposed motion is to be made.

After the order has been made, the practitioner obtains an office copy of it, in order to file it with the other documents necessary for obtaining the grant of probate or administration applied for by him.

Citation.—Upon citing a person or persons to accept or refuse a grant the practitioner will enter a caveat (a).

If no appearance be given to the citation, the party citant will move the court for the grant.

If, however, the party cited, or one of the parties cited, appear in order to take the grant, some practitioner will enter an appearance for him.

The solicitor of the party cited then takes out a *summons* against the party citant, to show cause why the grant should not be decreed to his client.

The order having been made, it is in this case, the final order in the cause.

Failing to Prosecute.—If the party opposing a will or a grant of administration fail to prosecute his proceedings, *e. g.*, by not pleading, &c., the plaintiff takes out a *summons* (see *ante*) against the defendant to show cause why the plea should not be filed at a time limited, &c. If no obedience be paid to the summons, the plaintiff will take out another summons against the defendant "to show cause" why the contentious proceedings "should not be discontinued."

An order may be made by the judge thereon to the effect of the summons and directing the grant to issue.

(a) *Vide ante* chapter on citations.

Subducting Caveat.—If the defendant determine to *subduct* or withdraw his caveat, he may be allowed to do so. (*Vide* Coote, 3rd Edition, 218.)

Letters delivered to Senior.—When a grant is made to two parties in equal degree, represented by distinct practitioners, the grant is extracted by and delivered to the senior, as to admission, of the two.

Duplicate.—Within the space of six months from the date of a grant of probate or administration a duplicate of it may be obtained (a).

Deposit of Wills in the Registries for Custody.—In addition to, and in qualification of what has been said under sec. 11, S. C. Act, *ante*, the E. C. P. practice under the corresponding section, Imp. Stat., may be cited (b), as indicating the practice, so far as the circumstances of the case admit, appropriate in the Surrogate Court Registries, in the absence of any directions in the S. C. Rules on the subject, as follows :—

“The will or codicil to be deposited must be enclosed in a sealed envelope and delivered to one of the registrars of the court at the registry, either by the testator himself or by some person specially authorized by him to deposit the same on his behalf.

“The will or codicil so deposited will not be delivered up to any person, but must remain in the registry until after the testator’s death.

“*In case the testator himself deposits his will or codicil*, he will be required to sign his name, in the presence of the registrar, to an indorsement on the envelope in which the will or codicil is inclosed, to the following effect :—

“‘This sealed packet contains the last will and testament, or codicil to the last will and testament, or last will and testament and codicil thereto, bearing date respectively [here state the dates of all the papers enclosed], of A. B., of &c., whereof C. D., of &c., and E. F., of &c., are appointed executors, and the same are brought into the registry of Her Majesty’s Court of Probate (*Surrogate Court of* —) by me for safe custody, there to remain deposited until after my decease.’ The residences of the testator and of the executors should be set forth in this indorsement, and also the date of signature.

“*In case the testator authorizes some other person to deposit his will or codicil for him*, he will be required to subscribe his name, in presence of an attesting witness, to an indorsement on the envelope in which the will or codicil is enclosed, to the following effect :—

“‘This sealed packet contains the last will and testament, or codicil to the last will and testament, or last will and testament and

(a) Coote, 3rd Ed. 220.

(b) D. & B. 587.

codicil thereto, of me, A. B., of &c., whereof C. D. and E. F. of &c., are appointed executors, and I authorize G. H. to deposit the same for safe custody in the registry of Her Majesty's Court of Probate (*Surrogate Court of —*), there to remain deposited until after my decease.' (Signed) A. B. Witness K. L.' The residences of the testator and of the executors, and the date of signature, should be set forth in this indorsement.

"The packet containing the will or codicil must be accompanied by an affidavit from the attesting witness, to the effect that the signature of the testator to the above indorsement, witnessed by the deponent, is in the proper handwriting of such testator, and was by him signed in the deponent's presence on the day mentioned in the indorsement, and that the signature K. L. is in the proper handwriting of the deponent." An affidavit will also be required from the person authorized to deposit the packet, to the effect that the sealed packet produced for the purpose of being deposited for safe custody in the registry of Her Majesty's Court of Probate (*Surrogate Court of —*), and on the back of which the deponent has signed his name, is at the time of making the affidavit precisely in the same state, plight and condition, as when received by the deponent from the hands of A. B. [the testator], on a day to be mentioned as that on which he received it.

"The last-mentioned affidavit is to be sworn before the registrar to whom the packet containing the will or codicil is delivered.

"A minute * * will be drawn up by the registrar, setting forth the production of the packet containing the will or codicil, and the affidavits (if any), and when and by whom the same were produced, and * * * that the same has been deposited in the registry for safe custody."

APPENDIX E.

ADDITIONAL FORMS, ADAPTED FROM MR. COOTE'S COMMON FORM PRACTICE, 8TH ED.; AND OTHER FORMS.

NO. 50.] AFFIDAVIT OF ATTESTING WITNESS IN PROOF OF THE DUE EXECUTION OF A WILL OR CODICIL, DATED AFTER 31ST DECEMBER, 1873.

In Her Majesty's Surrogate Court of the County of

In the goods of, &c.

I, C. D. of in the county of make oath [*or solemnly affirm*], that I am one of the subscribing witnesses to the last will and testament [*or codicil, as the case may be*] of the said C. D., late of in the county of deceased, the said will [*or codicil*] being now hereunto annexed, bearing date and that the said testator executed the said will [*or codicil*] on the day of the date thereof, by signing his name at the foot or end thereof [*or in the testimonium clause thereof, or in the attestation clause thereto, as the case may be*], as the same now appears thereon, in the presence of me and of the other subscribed witness thereto, both of us being present at the same time, and we thereupon attested and subscribed the said will [*or codicil*] in the presence of the said testator.

Sworn, &c.

(Signed) C. D.

N. B.—*If the signature is in testimonium clause or attestation clause, it must be shown in the affidavit that the testator fully intended the same as his final signature to his will. Vide Coote, 8th Ed. 471.*

NO. 51.] AFFIDAVIT AS TO A TESTATOR'S KNOWLEDGE OF THE CONTENTS OF HIS WILL, IN CASES OF BLIND OR OBVIOUSLY ILLITERATE OR IGNORANT TESTATORS.

The following additional clause to be added to Affidavit of subscribing witness, &c. :—

And I further make oath, that previously to the execution of the said will by the said testator, the same was duly read over to him by me (or

by E. F. in my presence, or by himself in my presence), and he the said deceased at such time seemed thoroughly to understand the same (or had full knowledge of the contents thereof).

Sworn, &c.

(Signed) C. D.

No. 52.] AFFIDAVIT VERIFYING ALTERATIONS IN A WILL (MADE BY A SUBSCRIBED WITNESS).

(Style, &c.)

I, C. D., of make oath and say, that I am one of the attesting witnesses to the last will and testament of the said A. B., late of deceased, the said will being now hereunto annexed and bearing date the day of 18 , and having particularly observed the words interlined between the and lines of the sheet of the said will, make oath and say as follows :—

1. That the said testator executed the said will on the day of the date thereof by signing his name at the foot or end thereof as the same now appears thereon, in the presence of me the said C. D. and of E. F., the other subscribed witness thereto, both of us being present at the same time, and we thereupon attested and subscribed the said will in the presence of the said testator.

2. And I further make oath and say, that the said recited interlineation was written and made in the said will previously to the execution thereof.

Sworn, &c.

No. 53.] AFFIDAVIT AS TO DEATH OF ATTESTING WITNESSES.

(Style, &c.)

We, C. D., of widow, E. F. of , and H. J. of having severally with care and attention inspected the last will and testament of the said A. B., late of deceased, the said will being now hereunto annexed, beginning thus, “ ” ending thus “ ,” and being thus subscribed “ A. B.,” and having also observed the names and additions, K. L., &c., and M. N., &c., set and subscribed to the said will as witnesses attesting the due execution thereof, severally make oath and say as follows :—

1. I, the said C. D., for myself say, that I am the lawful widow and relict of the said testator, and the sole executrix named in the said will.

2. I, the said C. D., further say, that I have made inquiries, and have caused inquiries to be made respecting the execution of the said will, and by means of such inquiries, I have ascertained that no person or persons

was or were present at the execution of the said will, save and except the said testator, and the said K. L. and M. N.

3. I, the said E. F. for myself say, that I knew and was well acquainted with the said A. B., who died on the day of 18 , at , for many years before and down to the time of his death, and that during such period I have frequently seen him write and subscribe his name to writings, and I have thereby become well acquainted with his manner and character of handwriting and subscription, and I say, that I verily and in my conscience believe the names A. B. subscribed to the said will as afore-said to be of the true and proper handwriting and subscription of the said A. B. deceased.

4. I, the said E. F., for myself say that I knew and was well acquainted with the said K. L., whose name appears subscribed to the said will, as one of the attesting witnesses thereto, for years before and down to the time of his death, and that the said K. L. died on or about the day of 18 .

5. I, the said E. F., further say, that during the period of my acquaintance with the said K. L., I frequently saw him write, and also subscribe his name to writings, whereby I have become well acquainted with his manner and character of handwriting and subscription; and I further say, that I verily and in my conscience believe that the letter-name, figures and words, K. L., &c., before recited, and now appearing set and subscribed to the said will, as one of the attesting witnesses thereto, were and are of the proper handwriting and subscription of the said K. L.

6. I, the said H. J., for myself say, that I am a cousin of the said M. N., whose name appears set and subscribed to the said will, as the other witness thereto, and that the said M. N. died on or about the day of 18 .

7. And I, the said H. J., further say, that I have frequently seen the said M. N. write and subscribe his name to writings, whereby I have become well acquainted with his manner and character of handwriting and subscription; and I further say, that I verily and in my conscience believe that the names and words M. N., &c., before recited, and now appearing set and subscribed to the said will, as one of the attesting witnesses thereto, were and are of the proper handwriting and subscription of the said M. N.

Sworn by the said C. D., E. F., and H. J.,	}	C. D.
severally (a), at this day		E. F.
of 18 , before me		H. J.

(a) See S. C. Rule, 33, *ante*.

No. 54.] AFFIDAVIT AS TO ABSENCE OF ATTESTING WITNESSES, &c.

(Style, &c.)

We, C. D., of in the county of and E. F., of in the county of jointly and severally make oath and say as follows :—

1. We have with care and attention inspected the last will and testament of the said A. B., late of in the county of spinster, deceased, the said will being now hereunto annexed, beginning thus “ ” ending thus “ ” and being thus subscribed “A. B.,” and have also observed the names and additions G. H. and I. K., set and subscribed to the said will as witnesses attesting the due execution thereof.

2. I, the said E. F., further say, that I knew and was well acquainted with the said testatrix, who died on the day of 18 at for many years before, and down to the time of her death, and that during such period I have frequently seen her write and subscribe her name to writings, and I have thereby become well acquainted with her manner and character of handwriting and subscription, and I say that I verily and in my conscience believe the names A. B., subscribed to the said will as aforesaid, to be of the true and proper handwriting and subscription of the said A. B., deceased.

3. I, the said C. D., for myself say, that I am the sole executor named in the said will, and that I have made inquiries and have caused inquiries to be made respecting the execution of the said will, and by means of such inquiries I have ascertained that no person or persons was or were present at the time of the execution of the said will, save and except the said testatrix, and the said G. H. and I. K.

4. I, the said E. F., for myself say, that I am the uncle of the said I. K., whose name appears set and subscribed to the said will, as one of the attesting witnesses thereto, and that the said I. K., in the month of 18 left this country for some part or place abroad unknown to this deponent and has not since been heard of.

5. I, the said E. F., for myself further say, that I have frequently seen the said I. K. write and subscribe his name to writings, whereby I have become well acquainted with his manner and character of handwriting and subscription ; and I further say, that I verily and in my conscience believe that the names I. K. before recited, and now appearing set and subscribed to the said will as one of the attesting witnesses thereto, were and are of the true and proper handwriting and subscription of the said I. K.

(6, & 7. Repeat as to the other attesting witness.)

Sworn, &c.

{

C. D.

E. F.

No. 55.]

AFFIDAVIT OF DOMICILE.

(Style, &c.)

I, C. D., of _____, &c., make oath and say, that I knew and was acquainted with the said A. B., late of _____, in the State of _____, one of the United States (or other foreign country, as the case may be), who died on the _____ day of _____, at _____. And I further say that the said deceased was at the time of his death domiciled in the said State of _____.

Sworn, &c. (a).

No. 56.]

AFFIDAVIT AS TO FOREIGN LAW.

(Style, &c.)

I, C. D., of _____ [*an advocate or other person conversant with the laws of the country, or, in Scotland, a writer to the signet*], make oath and say as follows:—

1. I am conversant with the laws and constitutions of the kingdom of _____.
2. I have referred to the last will and testament of the said A. B., bearing date the _____ day of _____, 18____, and now hereunto annexed, and I say that the said will is made in conformity with and is valid by the aforesaid laws and constitutions.

Sworn, &c.

No. 57.] AFFIDAVIT TO LEAD CITATION TO ACCEPT OR REFUSE ADMINISTRATION.

(Style, &c.)

I, C. D., of _____, make oath and say, that A. B., late of _____, deceased, died on the _____ day of _____, 18____, at _____, intestate without child or parent, leaving E. F. his lawful widow and relict him surviving:

And I further make oath and say, that the said E. F. has not taken upon her as yet the letters of administration of the personal estate and effects of the said deceased:

And I further make oath and say, that I am the natural and lawful brother and one of the next of kin of the said deceased, and am desirous

(a) If the deponent be also attesting witness to the will, he should also depose to the mode in which the will or codicil was executed.

of obtaining letters of administration of the personal estate and effects of the said deceased :

And I further make oath and say, that the personal estate and effects left by the said deceased consist of (*state the nature and amount of the property*) (a).

Sworn, &c.

If the party to be cited reside abroad, insert a clause, showing that fact, as "The said E. F. now resides in the Island of Barbadoes, and has no agent or attorney authorized to act for her in this Province." (Coote, 8th ed. 485.)

No. 58.] AFFIDAVIT OF DEBT TO LEAD CITATION.

(*Style, &c.*)

I, C. D., of _____, make oath and say, that the said A. B., late of _____, deceased, died on the _____ day of _____ 18____, at _____, intestate, a bachelor without parent, brother or sister, uncle or aunt, nephew or niece, cousin german or any other known relation whatever :

And I further make oath and say, that the said deceased was at the time of his death justly and truly indebted to me in the sum of _____ of lawful money of Canada for work and labour done, materials found and goods sold and delivered, between the _____ day of _____ and the _____ day of _____, by me to the said deceased in my business of a _____ [or in any other way], and that no part of such sum has been since received by me or by any person on my behalf, but that the whole thereof still remains justly due and owing to me, and I hold no security whatever for the same or any part thereof (b) :

And I further make oath and say, that the estate and effects of the said deceased consist of, &c. [*state amount and particulars*].

Sworn, &c.

No. 59.] AFFIDAVIT TO LEAD CITATION TO EXHIBIT AN INVENTORY.

(*Style, &c.*)

I, C. D. [wife of W. D.], make oath and say as follows :—

1. The said A. B., late of _____, deceased, died on the _____ day of _____, at _____, intestate, leaving him surviving M. B., his lawful

(a) *Briggs v. Roope*, L. J. R. (N.S.), vol. 29, p. 96.

(b) The date of debt must be shown ; *Aitkin v. Ford*, 3 Hag. 194 ; and *Rawlinson v. Burnell*, 3 Sw. & Tr., p. 479.

widow and relict, and L. S. [wife of J. S.], me, this deponent, and T. B., spinster, his natural and lawful and only children and only next of kin, respectively, the only persons entitled in distribution to his personal estate and effects.

2. On the day of , letters of administration of all and singular the personal estate and effects of the said deceased were granted by this Court to the said M. B., the lawful widow and relict of the said deceased.

3. The said M. B. has sworn the personal estate and effects of deceased under the sum of , but I verily believe the same to be considerably less than the true amount and value thereof.

4. Part of the said estate consists of stock and growing crops which should be forthwith valued and appraised before the same are removed or sold in order that the true value thereof, as assets belonging to the said estate, may be satisfactorily ascertained.

5. Under the circumstances aforesaid, and upon other grounds, I am desirous of obtaining from this Court a citation calling upon the said M. B. to exhibit upon oath a true and perfect inventory of all and singular the personal estate and effects of the said deceased.

Sworn, &c.

No. 60.] AFFIDAVIT TO LEAD CITATION WHERE THE PARTY TO BE CITED
RESIDES ABROAD.

(Style, &c.)

I, C. D., of , make oath and say as follows :—

1. The said A. B., late of , deceased, died on the day of , 18 , at aforesaid, intestate, without child or father, leaving E. F., his lawful widow and relict, him surviving.

2. The said E. F. now resides in the Island of Barbadoes, and has no agent or attorney authorized to act for her in this country (a).

3. The said E. F. has not taken upon her as yet the letters of administration of the personal estate and effects of the said deceased.

4. I am the natural and lawful mother, and only next of kin of the said deceased.

5. The personal estate and effects of the said deceased consist of
&c.

(Signed) C.D.

Sworn, &c.

(a) See *Evans v. Burrell*, 28, L. J. R., N. S. p. 83; *Atkin v. Ford*, 3 Hagg. 194—
and in note.

No. 61.]

AFFIDAVIT IN PROOF OF LUNACY.

(Style, &c.)

We, C. D., of surgeon, and E. F. of (nurse at a lunatic asylum), make oath and say respectively as follows :—

And I, the said C. D., for myself make oath, that for the space of years now last past, I have attended in my professional capacity E. B. (who is as I am informed and believe, the natural and lawful father of the said A. B., late of , deceased), the said E. B. being a patient under the care of my fellow deponent, the said E. F., at the asylum or house for the reception of lunatics at , aforesaid, and that the said E. B. hath been for many years, and now is a lunatic, and totally incapable of managing himself or his affairs, or of doing any act whether requiring thought, judgment or reflection, and is not likely soon to recover the use of his mental faculties.

And I, the said E. F., for myself, make oath, that I am a nurse at the said lunatic asylum or house for the reception of lunatics, where the said E. B. hath been for years last past confined thereat, and has been under my care as a person of unsound mind, and that he is a lunatic and totally incapable of managing himself or his affairs.

Sworn, &c., by the said C. D. and E. F. before me.

(Signed)

C. D.
E. F.

No. 62.]

AFFIDAVIT TO LEAD ORDER FOR GUARDIAN OF INFANT TAKING ADMINISTRATION.

(Style &c.)

I, C. D., of make oath and say as follows :
The said A. B. of died at aforesaid, on the day of 18 . intestate, a widower, leaving E. F. his natural and lawful and only child, who is now an infant of six years and upwards, but under the age of seven years, and who, therefore, as I am advised, is by law incapable of acting in his own name, and of electing a guardian to act on his part and behalf.

2. I am the lawful grandfather and the next of kin of the said infant, and I am ready and willing to undertake the guardianship of the said infant for the purpose of taking letters of administration of the personal estate and effects of the said A. B., deceased, for the use and benefit of the said infant, until he shall attain the age of twenty-one years.

Sworn &c).

No. 63.] AFFIDAVIT TO LEAD ORDER FOR GUARDIAN OF INFANT RENOUNCING.

(Style &c).

I, C. D., of in the County of make oath and say, that A. B. late of , deceased, died on the day of 18 a widower and intestate, leaving him surviving E. F. and G. H., his natural and lawful and only children, and only next of kin, who are now in their infancy to wit, the said E. F., of the age of years and upward, and the said G. H., of the age of years and upwards, but respectively under the age of seven years, and who, therefore, as I am advised, are by law incapable of acting in their own names or of electing a guardian to act on their part and behalf.

And I further make oath and say, that I am the lawful grandmother and next of kin of said infants, and am ready and willing to undertake the guardianship of the said infants, for the purpose of renouncing on their part and behalf all their right, title, and interest to and in the personal estate and effects of the said A. B., deceased.

Sworn &c).

No. 64.] AFFIDAVIT TO LEAD ALTERATION IN GRANT.

(Style &c).

I, C. D., of make oath and say, that on the day of 18 , letters of administration of the personal estate and effects of the said John Davies, late of deceased, were granted by Court of to me this deponent, the natural and lawful and next of kin of the said deceased, but the said deceased's surname was not in the same letters of administration erroneously written and spelt "Davis" instead of "Davies."

That the true and proper surname of the said deceased was "Davies" and not "Davis," and the same was so as aforesaid written and spelt "Davis" entirely through error and by mistake.

That I am desirous that the said letters of administration may be altered by substituting for the said surname "Davis" now appearing therein, the surname "Davies" as the true and proper surname of the said deceased.

Sworn, &c.

**No. 65] AFFIDAVIT TO LEAD SUBPENA TO A SOLICITOR TO BRING IN
SCRIPT.**

(Formal Parts.)

I, C. D., of make oath and say as follows :

1. The said A. B., late of deceased, died on the day of
18 . at having made and duly executed his last will and testa-
ment, bearing date the day of 18 , and therein ap-
pointed me, this deponent, sole executor and universal legatee.

2. The said original will was immediately after the execution thereof
handed by the said deceased to E. F., of his solicitor, and the
same has ever since remained, and now is in the possession, within the
power, or under the control of the said E. F., who declines to deliver it
up to me, this deponent.

3. And I, this deponent, am desirous that the said will should be
brought into the registry of this Court in order that I may prove the same
or otherwise act as I may be advised.

And I further say that the said E. F. resides at .

Sworn &c.

(Signed,)

C. D. .

*(The Affidavit to lead Subpœna to Executors or others, may be framed from
the foregoing).*

**No. 66.] CITATION TO ACCEPT OR REFUSE PROBATE AND LETTERS OF
ADMINISTRATION (WILL), &c.**

(Style, &c.)

VICTORIA, by the grace of God of the United Kingdom of Great Britain
and Ireland, Queen, Defender of the Faith : To J. K., of A. B.,
of &c., &c.

WHEREAS it appears by an affidavit of G. H., of sworn on the
day of 18 , and filed in the registry of our said
Court, that E. F., late of deceased, died on the day of
18 , at having made and duly executed his last will
and testament bearing date the day of and thereof ap-
pointed J. K. sole executor, and thereby gave and bequeathed to him the
said J. K. the residue of his personal estate and effects, upon trust to in-
vest the same for the benefit of all and every the children of the said J.
K. who should attain the age of twenty-one years, to be equally divided
between and amongst them : and whereas it further appears by the said
affidavit that A. B., C. D., &c., are the natural and lawful and only chil-

dren of the said J. K., and as such are the residuary legatees named in the said will as aforesaid : and whereas it further appears by the said affidavit that G. H. is a legatee named in the will of the said deceased : Now this is to command you, the said J.K., A.B., C.D., &c., that within days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our said Court, and you the said J. K. accept or refuse as well the probate and execution of the said will as the letters of administration (with the same annexed) of all and singular the personal estate and effects of the said deceased, and you the said A.B., C.D., &c., accept or refuse the said letters of administration (with the said will annexed) of all and singular the personal estate and effects of the said deceased, or respectively show cause why the said letters of administration (with the said will annexed) of all and singular the personal estate and effects of the said deceased should not be committed and granted to the said G.H. the legatee aforesaid. And take notice, that in default of your so appearing and accepting and extracting the said probate or letters of administration (with the said will annexed), the Judge of our said court will proceed to grant letters of administration (with the said will annexed) of the personal estate and effects of the said deceased to the said G.H. your absence notwithstanding.

Dated at this day of one thousand eight hundred and
and in the year of our reign.

Citation.

J. Smith, Solicitor, [L.S.] M. N.,
Guelph. Registrar.

NO. 67.] CITATION TO ACCEPT OR REFUSE LETTERS OF ADMINISTRATION.

(Style, &c.)

VICTORIA, by the grace of God of the United Kingdom of Great Britain
and Ireland, Queen, Defender of the Faith : To E. F., of in the
County of .

WHEREAS it appears by an affidavit of A. B., of dated
the day of and filed in the registry of our said
court, that C. D., late of died on the day of
18 a bachelor and intestate, leaving E. F. his natural and lawful
father : and whereas it further appears by the said affidavit that the
said A. B. is a creditor of the said deceased : Now this is to command
you, that within eight days after the service hereof on you, inclusive
of the day of such service, you do cause an appearance to be entered

for you in our said Surrogate Court, and accept or refuse the letters of administration of all and singular the personal estate and effects of the said deceased, or show cause why the same should not be granted by authority of our said court to the said A. B. a creditor of the said deceased. And take notice, that in default of your so appearing and accepting and extracting the said letters of administration, the Judge of our said court will proceed to decree letters of administration of all and singular the personal estate and effects of the said deceased to the said A. B. your absence notwithstanding. Dated, &c.

Citation.

[L.S.] M. N.,
Registrar.

No. 68.] CITATION TO ACCEPT OR REFUSE LIMITED ADMINISTRATION.

(Style &c.)

To A. B., of in the county widow.

WHEREAS it appears by an affidavit of C. D., sworn on the day of , 18 , and filed in the registry of our said Court, late of , in the County of , deceased, died on the day of , 18 , at aforesaid, a widower and intestate, leaving him surviving A. B., his natural and lawful child and only next of kin, the only person entitled to his personal estate and effects.

Now this is to command you, the said A. B., that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the said registry of our said Surrogate Court, and accept or refuse letters of administration of all and singular the personal estate and effects of the said deceased, or show cause why letters of administration of the personal estate and effects of the said deceased limited so far only as concerns all his right, title, and interest in and to the sum of dollars with interest due, and to become due thereon, secured by an indenture of mortgage bearing date, &c. (*short description of mortgage or other instrument*) should not be granted by the authority of our said Surrogate Court to the said C. D., the sole person entitled to or beneficially interested in the said sum of dollars or to some person to be named by him on his part and behalf.

And take notice that in default of your so appearing and accepting and extracting the said letters of administration as aforesaid, the Judge of our said Surrogate Court will proceed to grant letters of administration of the personal estate and effects of the said deceased limited as aforesaid, or under such other limitations as to the Judge aforesaid shall seem meet, your absence notwithstanding.

Dated, &c.

[L. S.] M. N.,
Registrar.

No. 69.] CITATION AGAINST THE NEXT OF KIN (IF ANY) AND ALL PERSONS
IN GENERAL TO ACCEPT OR REFUSE ADMINISTRATION.

(Style &c.)

To the next of kin, if any, and all other persons in general having, or pretending to have, any interest in the estate and effects of A.B., late of _____, deceased.

WHEREAS it appears by an affidavit of C. D., of _____, sworn on the _____ day of _____, 18____, and filed in the registry of our said Court, that the said A. B., late of _____, died on the _____ day of _____, 18____, at _____, intestate, a bachelor without parent, brother or sister, uncle or aunt, nephew or niece, cousin german or any other known relative, and that the said C. D. is a creditor of the said deceased.

Now this is to command you, that within _____ days after the service hereof, inclusive of the day of such service, you do cause an appearance to be entered for you in our said Court, and accept or refuse letters of administration of all and singular the personal estate and effects of the said A. B. deceased, or show cause why the same should not be granted to the said C. D., a creditor of the said deceased. And take notice, that in default of your so appearing and accepting or extracting the said letters of administration, the Judge of our said Court will proceed to grant letters of administration of the personal estate and effects of the said deceased to the said C. D., your absence notwithstanding.

Dated, &c.

[L.S.] E. F.,
Registrar.

No. 70.] CITATION TO EXHIBIT INVENTORY AND ACCOUNT.

(Style &c.)

WHEREAS it appears by an affidavit of C. D., sworn on the _____ day of _____ and filed in the registry of our said Surrogate Court of _____ that on the _____ day of _____ 18____, letters of administration of all and singular the personal estate and effects of E. F., late of _____ deceased, were granted by our said Court to the said A. B., the lawful widow and relict of the said deceased : And whereas it further appears by the said affidavit that the said C. D. is a creditor of the said deceased : Now this is to command you, the said A. B., that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the registry of our said Court, and by virtue of your corporal oath exhibit, bring into and leave in the said registry a true and

perfect inventory of all and singular the personal estate and effects of the said deceased, which have at any time since his death come into your hands, possession, or knowledge ; and by virtue of your like oath render a just and true account of your administration thereof.

Dated &c., as before.

No. 71.]

ABSTRACT OF CITATION.

(For Advertising.)

(Style &c.)

To A. B., of &c. widow.

TAKE NOTICE that a citation has issued under the seal of the said Court, dated the day of 18 . whereby you A. B. are cited to appear within days after the publication of this notice, and accept or refuse letters of administration of the personal estate and effects of C. B., late of late your husband deceased, or show cause why the same should not be granted to D. B., the natural and lawful sister, and one of the next of kin of the said deceased, with an intimation that in default of your appearance the said letters of administration will be granted to the said D. B.

Registrar.

H. & B.

of Solicitors.

No. 72.] NOTICE OF APPLICATION FOR LETTERS OF GUARDIANSHIP.

(Required by Section 2, Act respecting Guardians.)

In the matter of the Guardianship of the Infant Children of C, D., deceased.

APPLICATION will be made to the Surrogate Court of the County of before the Judge in Chambers at the Court House in after the expiration of twenty days from the first publication hereof (by the infants, or) on behalf of A. B., of &c. (state relationship of applicant, if any) for an order appointing the said A. B. guardian of E. F. and G. H., infant children of the said A. B., deceased.

Dated at this day of A. D. 18 .

A. B. by X. Y.,
his Solicitor, &c.

No. 73.] NOTICE UNDER SECTION 34, S. C. ACT, OF APPLICATION FOR
PROBATE.

In the Surrogate Court of

In the goods of , deceased.

NOTICE is hereby given that that after publication hereof in three successive issues of the *Ontario Gazette*, the undersigned will make application to the Surrogate Court of the County of , for a grant of letters probate of the will of , late of , formerly of , who died at on or about the day of , having at the time of his death no fixed place of abode in the Province of Ontario, but leaving personal estate (or, as the case may be) in the said County of to be administered, which will bears date the day of , 18 .

Dated at , the day of

A. B. }
& } *Executors.*
C. D. }

by E. F. their Solicitor.

No. 74.] NOTICE OF APPLICATION, UNDER SEC. 34, S. C. ACT, FOR
LETTERS OF ADMINISTRATION.

In the Surrogate Court of

In the goods of , deceased.

NOTICE is hereby given that, after publication hereof in three successive issues of the *Ontario Gazette*, the undersigned will make application to the Surrogate Court of the County of , for a grant of Letters of Administration of the personal estate and effects, rights and credits of , late of deceased, who died at , on or about intestate, having at the time of his death no fixed place of abode in the Province of Ontario, but leaving personal estate (or as the case may be) in the said County of to be administered.

Dated at the day of A.D.

A. B.
Widow of the intestate

By C. D.
Her solicitor.

No. 75.] AFFIDAVIT OF SEARCH, AND NON APPEARANCE TO CITATION.

In the Surrogate Court of the County of

Between A. B. Plaintiff,
and
C. D. Defendant.

In the goods of E. F. deceased.

I, G. H. clerk to L. M. of , solicitor for the above named plaintiff, make oath and say as follows :—

1. On the day of , 18 , the said L. M. extracted a citation in the above named suit.

2. On the day of , 18 , I duly and carefully searched in the registry of this court to ascertain whether or not any appearance to the said citation had been entered, either by or on behalf of the above named defendant, and I say that no appearance to the said citation has been entered either by or on behalf of the above named defendant.

Sworn, &c.

No. 76.] AFFIDAVIT AS TO THE INSERTION OF ADVERTISEMENTS.

(Style, &c.)

I, E. F., of proctor [or solicitor], make oath and say, that I am the proctor [or solicitor] of C. D. the party applying for letters of administration of the personal estate and effects of the said A. B., late of deceased :

And I further make oath and say, that, acting on behalf of the said C. D., I caused an advertisement requesting the relatives (if any) of the said deceased to apply to me to be inserted, once in the Toronto morning newspaper called the to wit, on the day of , and once in the Toronto morning newspaper called the to wit, on the day of , and once in the Toronto evening newspaper called the to wit, on the day of (as by reference to the said newspapers hereunto annexed (a) marked respectfully No. 1, No. 2 and No. 3, will more fully appear), but that no application whatever has been made to me this deponent in consequence of or in answer to the said advertisement, nor have I been able to obtain any information respecting the relatives (if any) of the said deceased.

(a) The newspapers themselves or the advertisement as the Judge or Registrar may require.

The Affidavit of insertion of advertisement for recovery of lost will, may be framed from this, adding :—

No application has been made to me this deponent in consequence of or in answer to the said advertisements, nor have I been able to obtain any information respecting the original will therein referred to.

Sworn, &c.

No. 77.] AFFIDAVIT OF RELICT TO LEAD A JOINT GRANT.

(Style, &c.)

I, C. D., of widow, make oath and say as follows, to wit :—

1. That the said A. B., late of deceased, died on the day of , 18 , at intestate, leaving me, this deponent, his lawful widow and relict, and E. F., G. H. and I. K., his natural and lawful and only children.

2. That I have been advised that by law and the practice of this Honourable Court, as the lawful widow and relict of the said deceased, I am entitled primarily and by preference to have the letters of administration of the personal estate and effects of the said deceased granted to myself alone, but I am, notwithstanding the same, consenting and desirous that the said E. F., who is the eldest son of myself and the said deceased, be joined with me in the letters of administration of the personal estate and effects of the said deceased.

Sworn, &c.

No. 78.] CONSENT OF THE OTHER NEXT OF KIN TO A GRANT BEING MADE JOINTLY TO RELICT AND ONE NEXT OF KIN.

(Style, &c.)

WHEREAS A. B., late of , deceased, died on the day of , 18 , at , intestate, leaving C. D. widow, his lawful relict, and E. F., G. H. and I. K., his natural and lawful and only children :

And whereas the said C. D. is consenting and desirous that the letters of administration of all and singular the personal estate and effects of the said deceased be committed and granted to her jointly with the said E. F. : Now we the said G. H., of , and I. K., of , do hereby severally declare that we expressly consent that letters of administration of all and singular the personal estate and effects of the said deceased be committed and granted to the said C. D. widow, and E. F.

jointly. And we do hereby appoint L. M., of _____, our proctor [solicitor or attorney] to file or cause to be filed this consent for us in the registry of this Court.

In witness whereof we have hereunto set our hands and seals this day of _____, 18 .

Signed, sealed and delivered } by the said G. H. and I. K. } in the presence of	G. H. (L.S.) I. K. (L.S.)
---	------------------------------

Witness.

No. 79.] NOMINATION OF A PERSON TO TAKE ADMINISTRATION FOR PURPOSE OF A SUIT IN CHANCERY.

(Style, &c.)

WHEREAS on the _____ day of _____, 18 , I, the undersigned A. B., of _____, filed my bill of complaint in the Court of Chancery of Ontario, against C. D. (since deceased) and others therein (amongst other things) setting forth [*state briefly the averments of the bill*], and praying relief in the premises as in the said bill is set forth :

And whereas divers proceedings have been had in the said suit, but no further proceedings can be had therein until there is a legal personal representative of the said C. D. before the said Court of Chancery :

And whereas the said C. D., late of _____, deceased, died on the _____ day of _____, 18 , at _____, intestate, and letters of administration of his personal estate and effects have not been granted to any person whomsoever, so that there is not any legal personal representative of the said deceased competent to be made a party to the said suit :

Now I, the said A. B., of _____, the plaintiff aforesaid, do hereby authorize and empower E. F., of _____, to procure letters of administration of the personal estate and effects of the said C. D., deceased, limited to the purpose only to become and be made a party to the aforesaid cause or suit depending in the Court of Chancery of Ontario, and to attend, supply, substantiate and confirm the proceedings already had, or that shall or may hereafter be had therein, or in any other cause or suit which may be commenced in the said court or in any other court between the before-mentioned parties, or any other parties, touching and concerning the matters at issue in the said cause or suit, and until a final decree shall be had and made therein, and the said decree carried into execution, and the execution thereof fully completed, to be granted to him as a person for that purpose named by me and on my part and behalf ; and I hereby appoint G. H., of _____, my proctor [solicitor or attorney]

to file or cause to be filed this nomination for me in the registry of Her Majesty's Surrogate Court of the County of .

In witness whereof I have hereunto set my hand and seal this day of , 18 .

Signed, sealed and delivered }
by the said C. D. in the } (L.S.)
presence of
Witness.

No. 80.] CONSENT TO A LIMITED GRANT FOR PURPOSES OF SUIT
IN CHANCERY.

(Style, &c.)

WHEREAS, on the day of 18 , A. B., of filed his bill of complaint in the Court of Chancery for Ontario, against C. D., since deceased, and others therein (amongst other things) setting forth (*state briefly the averments*), and praying relief in the premises, as in the said bill is set forth :

And whereas divers proceedings have been had in the said suit, but no further proceedings can be had therein until there is a legal personal representative of the said C. D. before the said Court of Chancery :

And whereas, the said C. D., late of deceased, died on the day of 18 , at a bachelor and intestate, leaving me, the undersigned E. D., his natural and lawful father him surviving ;

Now I, the said E. D. of do hereby declare that I expressly consent that letters of administration of the personal estate and effects of the said deceased, limited to the purpose only (*insert words of limitation as in preceding form*), may be granted to F. G., of as a person for that purpose named by and on behalf of the said A. B. And I do hereby appoint H. J., of my solicitor, to file or cause to be filed this consent for me, in the registry of the proper Surrogate Court in that behalf.

In witness, &c.

No. 81.] BOND (BY CREDITOR TAKING ADMINISTRATION) TO PAY
PRO RATA.

KNOW ALL MEN, &c. (as in No. 16, *ante*).

The condition of this obligation is such, that if the said C. D., a creditor, and administrator of the personal estate and effects of A. B., late of who died at aforesaid, on the day of 18 , do, out of the personal estate and effects of the said deceased, which shall come to and remain in his hands and possession, or in the hands or possession

sion of any other person or persons for him, and so far as the said personal estate and effects shall thereto extend, pay and satisfy all and singular the just debts of the said deceased, in a due course of administration, rateably and proportionably, and according to the priority required by law, and not unduly preferring his own debt or the debts of any other of the creditors of the said deceased, by reason of his being administrator, as aforesaid, then this obligation to be void and of none effect, or else to remain in full force and virtue.

Signed, sealed and delivered by the	C. D. (L. s.)
said C. D., E. F., and G. H., in	E. F. (L. s.)
the presence of	G. H. (L. s.)

(N.B.—Penalty of this bond is double the amount of the deceased's estate and effects, and two sureties are joined with the administrator therein.)

No. 82.] ADMINISTRATION BOND (54TH SECTION OF S. C. ACT).

(*With recital required by S. C. Rule. No 11, ante.*)

KNOW ALL MEN by there presents, &c. (as in No. 16, ante).

The condition of this obligation is such, that if the above named A. B., the person appointed by G. H., the Judge of the Surrogate Court aforesaid, under and by virtue of the 54th section of the "Surrogate Courts Act," to be the administrator of all and singular the personal estate and effects of late of deceased, who died on the day of 18 , do, when lawfully called on in that behalf, make or cause to be made, &c.

(*Proceed as in No. 16, ante, to the end.*)

No. 83.] ADMINISTRATION BOND DE BONIS NON.

KNOW ALL MEN BY THESE PRESENTS, &c. (as in No. 16, ante).

The condition of this obligation is such, that if the above named A. B., one of the natural and lawful children and next of kin of H. L., late of deceased (who died on the day of 18), and the intended administrator of all and singular the personal estate and effects, rights and credits of the said deceased, left unadministered by L. M., since also deceased, whilst living the lawful widow and relict of the said deceased do (*proceed as in No. 16, ante, to the end, inserting the words "left unadministered," after the expression "personal estate and effects, rights and credits,"—unless by the context it appears unnecessary.*)

No. 84.]

ADMINISTRATION DE BONIS NON.—GRANT.

(Style, &c.)

Be it known that A. B., late of _____, in the county of _____, deceased, died on _____, 18____, at _____, intestate, and that since his death, to wit, in the month of _____, 18____, letters of administration, of all and singular his personal estate and effects, were committed and granted by _____ to C. D. [*insert the Court from which the grant issued and the relationship or character of administrator*] (which letters of administration now remain of record in _____), who after taking such administration upon him intermeddled in the personal estate and effects of the said deceased, and afterwards died, to wit, on leaving part thereof unadministered, and that on the _____ day of _____, 18____, letters of administration of the said personal estate and effects, so left unadministered, were granted by Her Majesty's said Surrogate Court to _____, he having been first sworn well and faithfully to administer the same, by paying the just debts of the said intestate, and distributing the residue of his estate and effects according to law, and to exhibit a true and perfect inventory of the said personal estate and effects so left unadministered, and to render a just and true account thereof whenever required by law so to do.

[L. S.]

(Signed)

E. F.

Registrar.

No. 85.]

LETTERS OF ADMINISTRATION TO ATTORNEY OF INTESTATE'S HUSBAND, THE LATTER BEING OUT OF THE JURISDICTION.

(Formal Parts No. 21, ante, and recitals.)

* * * intestate, leaving C. D., her lawful husband, her surviving, who resides at San Francisco, in &c., and had at the time of her death a fixed place of abode at _____, in the said county of _____, were granted by Her Majesty's Surrogate Court of the _____ to E. F., the lawful attorney of the said C. D., for the use and benefit of the said C. D., and until he shall duly apply for and obtain letters of administration of the personal estate and effects of the said deceased to be granted to him, he, the said E. F., having been first sworn faithfully to administer, &c.
(conclude as in No. 21.)

No. 86.]

LIMITED ADMINISTRATION WITH WILL ANNEXED.

(Formal Parts see No. 20, ante, and recitals.)

And be it further known, that on the _____ day of _____, letters of administration, with the said will _____ annexed, of all and singular the

personal estate, &c., of the said deceased, were granted by Her Majesty's Surrogate Court of the Count of , to E. F., of the of , in the County of , the natural and lawful uncle and next of kin, and the guardian lawfully assigned (*or as the case may be*) to him the said C. D., for the use and benefit of him, the said C. D., and until he shall attain the age of twenty-one years (a), he, the said E. F., having, &c. (*conclude as in No. 20.*)

No. 87.] SPECIAL ADMINISTRATION OF THE REST OF THE GOODS OF A
MARRIED WOMAN.
(*Style, &c.*)

BE IT KNOWN, that A. B., wife of C. D., late of , died on the day of , at , having at the time of her death a fixed place of abode at , in the County of , and having during her coverture with the said C. D., by virtue of certain powers and authorities vested in her by a certain Indenture of Settlement bearing date the day of , and made between the said C. B. therein described, of , in the County of , gentleman, of the first part, the said deceased, by her then name and description of A. F., of , in the County of , widow, of the second part, and G. H., of the same place, esquire, of the third part, made and executed her last will and testament, bearing date the day of , and thereof appointed E. F. and G. H. executors.

AND BE IT ALSO KNOWN, that on the day of , probate of the said will, limited to the administration of all such personal estate and effects as she, the said deceased, by virtue of the said Indenture, had a right to appoint or dispose of, and has in and by her said will appointed or disposed of accordingly, but no further or otherwise, was granted by the Surrogate Court of to the said E. F. and G. H., the executors named in the said will.

AND BE IT FURTHER KNOWN, that on the day of , letters of administration of the rest of the personal estate and effects, rights and credits of the said A. B. deceased, were granted by the said Surrogate Court to the said C. B., the lawful husband of the said deceased, he having been first sworn well and faithfully (*as in No. 21, ante, the words "the rest of" being used in connection with "estate" (b).*)

(a) If more than one: "until one of them shall attain the age of twenty-one years."

(b) The various recitals required by S. C. Rules 11 & 14, *ante*, p. 77, are introduced in the letters of administration by the words:—"Be it known," as in the above Form.

No. 88.] POWER OF ATTORNEY TO TAKE ADMINISTRATION.

WHEREAS A. B., late of _____, deceased, died on the _____ day of _____, 18____, at _____, intestate, leaving surviving him C. D. his lawful widow and relict :

Now I, the said C. D., the lawful widow and relict of the said A. B., at present residing at _____ hereby nominate, constitute and appoint E. F. of _____ to be my lawful attorney for the purpose of obtaining letters of administration of all and singular the personal estate and effects of the said A. B., deceased, to be granted to him by the proper Surrogate Court in the said Province of Ontario, for my use and benefit, and until I shall duly apply for and obtain letters of administration of the personal estate and effects, rights and credits, of the said deceased to be granted to me ; and I hereby promise to ratify and confirm whatever my said attorney shall lawfully do or cause to be done on the premises.

In witness whereof I have hereunto set my hand and seal this day of _____ in the year of our Lord 18____.

Signed, sealed and delivered } [L. S.]
in the presence of }

No. 89.] POWER OF ATTORNEY TO TAKE ADMINISTRATION (WILL)
(EXECUTORS).

WHEREAS A. B., late of _____, deceased, died on the _____ day of _____, 18____, at _____, having made and duly executed his last will and testament, bearing date the _____ day of _____, 18____, and thereof appointed C. D. and E. F. executors :

Now we, the said C. D. and E. F., at present residing at _____ do hereby nominate, constitute and appoint G. H. of _____, to be our lawful attorney for the purpose of obtaining letters of administration (with the said will annexed) of all and singular the personal estate and effects, rights and credits, of the said A. B., deceased, to be granted to him by the proper Surrogate Court in the said Province of Ontario, for our use and benefit and until we shall duly apply for and obtain probate of the said will to be granted to us, and we hereby promise (*proceed as in last Form*).

No. 90.] POWER OF ATTORNEY TO TAKE ADMINISTRATION (WILL)
(RESIDUARY LEGATEE).

WHEREAS A. B., late of _____, deceased, died on the _____ day of _____, 18____, at _____, having made and duly executed his last will and testament with a codicil thereto, the said will bearing date the _____ day

of , 18 , and the said codicil bearing date the day of , 18 , and in and by his said will nominated and appointed C. D. and E. F. executors : and whereas the said C. D. and E. F. respectively died in the lifetime of the said deceased :

Now I, G. H., at present residing at , one of the residuary legatees named in the said will, do hereby nominate, constitute and appoint I. K. of , my lawful attorney for the purpose of obtaining letters of administration (with the said will and codicil annexed) of all and singular (*proceed as in last Form mutatis mutandis*).

No. 91.]

OATH FOR DOUBLE PROBATE.

(*Style, &c.*)

I, C. D., of , the son of the said deceased, make oath and say as follows :—

1. A. B., late of , deceased, died on the day of , 18 , at , having made and duly executed his last will and testament, bearing date the day of , 18 , and thereof appointed E. F. and me the said C. D. executors.

2. On or about the day of , 18 , the said E. F., one of the said executors, proved the said will in this Honourable Court, power being reserved of making the like grant of probate to me the said C. D., the other executor, when I should apply for the same (as by the acts and records thereof in the registry appears).

3. I believe the paper writing (a) [*proceed as in No. 13 ante p. 102*].

(a) The letters probate may be used and marked by deponent.

No. 92.]

OATH OF EXECUTOR, FORMER PROBATE HAVING BEEN REVOKED.

(*Style, &c.*)

1. (*See ante* No. 91), appointed his son, me this deponent, sole executor.

2. Notwithstanding the premises probate of an earlier will of the said testator to wit, dated the day of , 18 , was on or about the day of , 18 , granted by this Honourable Court to E. F. the sole executor therein named.

3. The said probate has been since voluntarily brought in by or on the part and behalf of the said E. F., and has been duly revoked and declared null and void to all intents and purposes in the law.

4. I believe the paper, &c. (*as in No. 13 ante*).

No. 93.]

OATH ON PROVING THE DRAFT OF A WILL.

(Style, &c.)

1. I, C. D., of make oath and say, that the said A. B., late of widow, deceased, died at on the day of having made and executed her last will and testament, bearing date the day of and thereof appointed her son, me the deponent, sole executor :

2. And I further say, that since the death of the said deceased the said will has been lost or so mislaid that it cannot now be found :

3. And I further say, that the said will was prepared from the draft thereof now remaining in the registry of this court, and that there is no authentic copy of the said will :

4. And I further say, that on the day of the Judge of this court pronounced for the force and validity of the said will as contained in the said draft, and decreed probate of the said will to be granted and committed to me as the sole executor therein named, limited until the original will or an authentic copy thereof be brought into and left in the registry of this court :

5. And I further make oath, that I believe the said paper writing now hereunto annexed and marked by me to contain the true and original draft of the said will of the said testatrix : That I am the sole executor therein named, and that I will well and faithfully administer the personal estate and effects of the said testatrix, limited until the said original will or an authentic copy thereof shall be brought into and left in the registry of this Court.

[Proceed as in Number 13 to end.]

No. 94.] OATH ON PROVING A COPY OF A WILL, THE ORIGINAL BEING LOST.

(Style, &c.)

I, C. D., of make oath and say, that A. B., late of deceased, died on the day of , 18 , at , having made and duly executed his last will and testament, bearing date the day of , and thereof appointed his wife D. B. (since deceased), and me the said C. D. executors.

And I further make oath and say, that at the time of the death of the said deceased, the said will was whole and uncanceled, and in the same state as when executed, but that the said will has since been lost, or so mislaid that the same cannot be now found.

And I further make oath and say, that shortly after the death of the said deceased, a copy of the said will was made by of solicitor,

at the request of the said D. B., widow, the relict of the said deceased, and the same was by him examined with the original and found to agree therewith.

And I further make oath and say, that I believe the said copy will, being the paper writing hereto annexed and marked by me to contain a true and faithful copy of the said true and original last will and testament of the said testator ; that I am the surviving executor named in the said will and that I will well and faithfully administer the personal estate and effects of the said testator, limited until the said original will or a more authentic copy thereof shall be brought into and left in the registry of this Court.

[*Proceed as Number 13 to the end.*]

No. 95.] OATH ON PROVING THE SUBSTANCE OR CONTENTS OF A WILL.

(*Style, &c.*)

I, C. D., of widow, make oath and say, that the said A. B., late of deceased, died at on the day of , having made and duly executed his last will and testament, bearing date in or about the month of , and thereof appointed his wife, me, this deponent, sole executrix.

And I further make oath and say, that after the date and execution of the said will, the same was deposited by the said deceased in his writing-desk, and remained therein till the day of when the said deceased abandoned his then residence at , and left in such residence his said writing-desk, together with other property and effects belonging to him, and notwithstanding diligent search and inquiry have since been made for such writing-desk and original will, the same cannot be found, and are believed to be irrecoverably lost or destroyed :

And I further make oath and say, that the said testator died without having altered or revoked his said will, and that on the day of the Judge of this Court, on motion of counsel, decree probate of the substance of the said will of the said deceased as contained in an affidavit duly made and sworn to by E. F., of to be granted to me, limited until the said original will or an authentic copy thereof be brought into and left in the registry of this Court :

And I further make oath and say, that I believe the paper writing or affidavit hereto annexed and marked by me to contain the substance of the said true and original last will and testament of the said deceased.

[*Proceed as in Number 93 mutatis mutandis to the end.*]

No. 96.] OATH ON PROVING A COPY OF A WILL TRANSMITTED TO ONTARIO
THE ORIGINAL BEING IN EXISTENCE ELSEWHERE.

(*Style, &c.*)

1. *As paragraph 1, No. 91.*

2. And I further make oath and say, that the said will was executed by the said deceased when he was a resident at _____, and the same was deposited by the said deceased after the execution thereof with E. F. of that place, and who still retains possession thereof :

3. And I further make oath and say, that on the _____ day of _____ a copy of the said will was received by me in due course of post from the said E. F.

4. And I further make oath and say, that I verily believe there is not now in Ontario a more authentic copy thereof than the aforesaid copy, and that it is essential to the interest of the estate of the said deceased that probate thereof should be granted without waiting the arrival of the said original will or a more authentic copy thereof :

5. And I further made oath and say, that I believe the paper writing hereunto annexed and marked by me to contain a true copy of the said last will and testament of the said deceased, and that I am the sole executor therein named :

[*Proceed as in Number 94 to the end.*]

No. 97.] OATH FOR PROBATE LIMITED TO THE TESTATRIX'S EXECUTORSHIP.

(*Style, &c.*)

I, C. B., of _____, make oath and say, that the said A. B., late of _____, deceased, died on the _____ day of _____, at _____, having during her coverture with the said B. B., in virtue of certain powers and authorities given to and vested in her by a certain indenture, bearing date the _____ day of _____, and made between her the said deceased by her then name and description of A. F., of _____, of the first part, G. H., of _____, of the second part, J. K., of _____, and L. M., of _____, of the third part, made and executed her last will and testament, and thereof appointed her son, me the said C. B., and her brother, N. O., executors, and that on the _____ day of _____, probate of the said will, limited so far only as concerned all the right, title and interest of her the said deceased in and to all such personal estate and effects, rights and credits as she the said deceased, by virtue of the said indenture, had a right

to appoint or dispose of, and had in and by her said will appointed and disposed of accordingly, but no further or otherwise, was granted by the Court of to me the said C. B., the said N. O. having renounced the probate and execution thereof :

And I further make oath and say, that the said A. B., widow, was the sole executrix of the will of P. Q., deceased, which will, on the day of , she duly proved in the Court of , and that the said P. Q. was the surviving executor of the will of R. S., late of deceased, which last mentioned will was proved in the said court on the day of by the said P. Q. :

And I further make oath and say, that I believe that the paper writing hereunto annexed and marked by me to contain the true and original and last will and testament of the said A. B., deceased, and that I will well and faithfully administer the personal estate and effects, rights and credits of the said deceased, limited so far as concerns all such personal estate, &c., as vested in her the said deceased as the sole executrix of the will of the said P. Q., deceased, and that I will exhibit a true and perfect inventory of the said estate and effects, limited as aforesaid, and render a just and true account thereof, &c.

(Proceed as in No. 15 ante.)

No. 98.] OATH FOR PROBATE *save and except.*

(Style, &c.)

I, C. D., of , make oath and say, that the said A. B., late of , deceased, died at , on the day of , 18 , having made and duly executed his last will and testament, bearing date the day of , 18 , and therein named his son, me the deponent, executor, save and except as regards all freehold, leasehold, and personal estates, hereditaments, money, securities for money and premises whatsoever vested in him upon or for the trusts or purposes of the last will and testament of E. F., late of , deceased.

And I further make oath and say, that I believe the paper writing hereunto annexed and marked by me to contain the true and original last will and testament of the said A. B., deceased, and that I am the executor therein named as aforesaid, and that I will faithfully administer the personal estate and effects of the said testator, save and except so far as relates to all (Repeat exception as above)

(Continue as in No. 13 ante.)

Sworn, &c.

D D

No. 99.

OATH FOR PROBATE *ceterorum*.*(Style, &c.)*

I, C. D., of _____, make oath and say, that the said A. B., late of _____, died on the _____ day of _____, 18____, at _____, having made and duly executed his last will and testament, bearing date the _____ day of _____, 18____, and therein named E. F. executor in respect of his literary papers and documents, and his son, me this deponent, executor as to the rest of his personal estate and effects :

And I further make oath and say, that in the month of _____, 18____, probate of the said will, limited so far only as respected the literary papers and documents of the said testator, was by authority of this Court granted to the said E. F. :

And I further make oath and say, that I believe the paper writing
(*Continue as in No. 13 ante, using the words "the rest of" in connection with the personal estate, &c.*)

No. 100.] OATH FOR CESSATE PROBATE, THE EXECUTOR HAVING ATTAINED HIS MAJORITY.

(Style &c.)

I, C. D., of _____, make oath and say, that the said A. B., late of _____, deceased, died on the _____ day of _____, 18____, at _____, having made and duly executed his last will and testament, bearing date the _____ day of _____, 18____, and thereof appointed his nephew, me this deponent, sole executor, I being then in my minority, to wit, of the age of _____ years only.

And I further make oath and say, that on the _____ day of _____, 18____, letters of administration (with the said will annexed) of all and singular the personal estate and effects of the said deceased were granted by this Court to E. F., the natural and lawful mother and next of kin and curatrix or guardian of me, this deponent, for my use and benefit until I should attain the age of twenty-one years (as by the acts and records now remaining in the registry thereof appears).

And I further make oath and say, that since the premises to wit, on the _____ day of _____, 18____, I, this deponent, have attained the age of twenty-one years, whereby the said letters of administration, with the said will annexed, have ceased and expired.

And I further make oath and say, that I believe the parchment or paper exhibit hereunto annexed, partly written and partly printed and marked by me, to contain, &c. (*Proceed as in No. 13 ante.*)

No. 101.] OATH FOR CESSATE PROBATE TO EXECUTOR WHERE ATTORNEY
HAS PROVED.

(Style &c.)

I, C. B., of _____, make oath and say, that the said A. B., late of _____, deceased, died on the _____ day of _____, 18____, at _____, having made and duly executed his last will and testament, bearing date the _____ day of _____, 18____, and thereof appointed his son, me this deponent, sole executor: And I further make oath, that on the _____ day of _____, 18____, letters of administration, with the said will annexed, of all and singular the personal estate and effects of the said deceased were, by authority of this Court granted to E. F. as the lawful attorney, and for the use and benefit of me, this deponent, who was then residing at _____, and until I should duly apply for and obtain probate of the said will to be granted to me (as by the acts and records, now remaining in the registry thereof, appears): And I further make oath, that since the premises I have returned to and am now resident in Ontario.

And I further make oath and say, that I believe the parchment exhibit hereunto annexed, partly written and partly printed, and marked by me, to contain the true last will and testament of the said deceased; that I am sole executor named in the said will, and I will well and faithfully administer &c. (*Proceed as in No. 13 ante.*)

No. 102.] OATH OF ADMINISTRATOR *pendente lite*.

(Style &c.)

I, C. D., of _____, make oath and say, that the said A. B., late of _____, widow, deceased, died on the _____ day of _____, having as asserted made her will, bearing date the _____ day of _____, but did not thereof appoint any executor.

And I further say, that there is now depending in judgment in the Court of _____, a certain action _____, instituted by E. F., the residuary legatee named in the same will, against me, the said C. D., one of the natural and lawful children, and one of the next of kin of the said deceased, touching and concerning the validity of the said will:

And I further make oath, that the Judge of the Surrogate Court of _____, did on the _____ day of _____, after hearing counsel, upon the consent of the other party to the said suit, decree letters of administration pending the said suit of all and singular the personal estate and effects, rights and credits, of the said deceased, to be granted to me, this deponent, (*or if the order has been made otherwise, state it as made*):

And I further make oath, that I will faithfully administer the personal estate and effects, rights and credits, of the said deceased, pending the said action, save distributing the residue thereof, under the directions and control of this Court ; that I will exhibit a true and perfect inventory, &c. (*Proceed as in No. 15 ante.*)

No. 103.] OATH FOR CESSATE ADMINISTRATION TO NEXT OF KIN ON ATTAINING HIS MAJORITY.

(*Style, &c.*)

I, C. D., of , make oath and say, that A. B., late of , deceased, died a widower and intestate ; that in the month of , 18 , letters of administration of the personal estate and effects of the said deceased were granted by this Court to E. F., the lawful and next of kin, and curator or guardian lawfully assigned of me this deponent (then an infant), the natural and lawful and only child, and only next of kin of the said deceased, for my use and benefit, and until I should attain the age of twenty-one years :

And I further make oath and say, that since the premises, to wit, on the day of , 18 , I, the deponent, have attained the age of twenty-one years, whereby the said letters of administration have ceased and expired.

And I further make oath and say, that I am the natural and lawful and only child and only next of kin of the said deceased ; that I will faithfully administer &c. (*Proceed as in No. 15.*)

No. 104.] OATH FOR ADMINISTRATION (WILL) TO LEGATEE.

(*Style, &c.*)

I, C. D., of make oath and say, that I believe the paper writing hereto annexed and marked by me, to contain the true and only last will and testament of A. B., late of deceased, that E. F., the sole executor and residuary legatee named in the said will, has duly renounced the probate and execution thereof, and also the letters of administration (with the said will annexed) of the personal estate and effects of the said deceased ; that I am a legatee named in the said will ; that I will well and faithfully administer, &c. (*Proceed as in No. 14, ante.*)

No. 105.] OATH OF AN ATTORNEY OF AN EXECUTOR (ON TAKING ADMINISTRATION WITH WILL).

(Style, &c.)

I, C. D., of make oath and say, that the said A. B., late of deceased, died at on the day of 18 , having made and duly executed his last will and testament, bearing date the day of 18 , and thereof appointed his son E. F. sole executor, who now resides at .

And I further make oath and say, that the said E. F. has, in and by a certain letter or power of attorney, under his hand and seal, duly appointed me, this deponent, to be his lawful attorney, for the purpose of administering on his behalf the estate of the said deceased in Ontario, as in and by the said power of attorney will appear :

And I further make oath and say, that I believe the paper writing hereunto annexed and marked by me, to contain the true and original last will and testament of the said deceased, and that I will well and faithfully administer the personal estate and effects of the said deceased, limited to such as are in the Province of Ontario, for the use and benefit of the said E. F., and until he shall duly apply for and obtain probate of the said will to be granted to him, by paying the just debts of the said deceased, and the legacies contained in his last will, and distributing the residue of his estate according to law.

That I will exhibit a true and perfect inventory of the said personal estate and effects, limited as aforesaid, and render, &c. (*As in No. 14, ante.*)

No. 106.] OATH FOR ADMINISTRATION DE BONIS NON TO REPRESENTATIVE OF INTESTATE'S ONLY CHILD, &c.

(Style, &c.)

I, C. D., of make oath and say, that A. B., late of deceased, died a bachelor (*or, a spinster*), and intestate, leaving E. F., his (*or her*) natural and lawful father and next of kin him (*or, her*) surviving; that in the month of 18 , letters of administration of the personal estate and effects of the said deceased were, by authority of this Court, granted to the said E. F., who for some time intermeddled in the said personal estate and effects, and died on the day of 18 , leaving part thereof unadministered; that I am one of the executors of the will of the said E. F., deceased (I having duly proved the said will in this Court, in the month of 18); that I will faithfully administer the personal estate and effects of the said deceased, left unadministered as aforesaid, by paying, &c. (*Proceed as in No. 15, ante, using the words "left unadministered," in connection with "estate and effects."*)

No. 107.] OATH FOR ADMINISTRATION (WILL) DE BONIS NON TO
RESIDUARY LEGATEE.

(Style, &c.)

I, C. D., of make oath and say as follows :—

1. The said A. B., late of deceased, died on the day of
18 , at having made and duly executed his last will and
testament, bearing date the day of 18 , and thereof appointed
E. F. sole executor, who, in the month of 18 , duly proved the
said will in this Court (as by the records of the said Court will appear),
and for some time intermeddled in the personal estate and effects of the
said deceased, and is since dead, to wit, on the day of 18
 , intestate, leaving part of the said personal estate and effects unad-
ministered.

2. I believe the paper writing, hereunto annexed and marked by me,
to contain the true and original last will and testament of the said de-
ceased, now remaining of record in the registry of and of which pro-
bate was granted as aforesaid.

3. I am the son and the residuary legatee named in the said will of the
said deceased, and I will well and faithfully administer, &c. (*Proceed as
in No. 14, ante, using the words "left unadministered" in connection with
estate, &c.*)

No. 108.] OATH FOR ADMINISTRATION IN CASE OF PRESUMPTIVE DEATH.

(Style, &c.)

I, C. D., of in the county of widow, make oath and say as
follows :—

1. The said A. B., late of in the county of deceased, died in
or since the year 18 , a bachelor, without father and intestate, but I am
unable to depose as to the place of his death.

2. On the day of July, 18 , the Judge of this Court, on motion
of counsel, decreed letters of administration of all and singular the per-
sonal estate and effects of the said A. B. deceased, to be granted to me,
this deponent, as the natural and lawful mother and only next of kin of
the said deceased, and permitted me to swear that the said deceased died
in or since the year 18 .

3. I am the natural and lawful mother and only next of kin of the said
deceased. (*Proceed as in No. 15, ante.*)

No. 109.] OATH OF GUARDIAN OR TESTAMENTARY GUARDIAN ADMINISTERING
FOR THE USE OF A MINOR OR INFANT,

or,

COMMITTEE OR NEXT OF KIN ADMINISTERING FOR THE USE OF A LUNATIC.

(Style, &c.)

I, C. D., of , make oath and say, that the said A. B., late of , deceased, died at , on the day of , a widower, and intestate, leaving E. F. and G. H. his natural, lawful and only children and only next of kin him surviving, (who are both now in their minority, to wit, the said E. F. of the age of years and upwards, and the said G. H. of the age of years and upwards, but severally under the age of twenty-one years) (or, who are now in their infancy, the said E. F. of the age of years, and the said G. H. of the age of years, but respectively under the age of seven years), (or, that the said E. F. has been for many years last past and is now a lunatic or person of unsound mind, and that by an order of the Honourable the Court of Chancery for Ontario made on the day of , I, this deponent, was appointed committee of the personal estate of the said lunatic, or, that no committee has been appointed of the personal estate of the said E. F. the lunatic aforesaid):

And I further make oath and say, that I am the lawful and next of kin of the said E. F. and G. H. (and that they have by an instrument in writing under their hands and seals, bearing date the day of , 18 , elected or chosen me), (or, and I have been duly assigned), to be their curator or guardian, for the purpose of taking letters of administration of all and singular the personal estate and effects of the said deceased for their use and benefit, and until one of them shall attain the age of twenty-one years :) (or, that J. K., late of , deceased, the natural and lawful father of the said minors, by his will, dated the day of , 18 , appointed me, this deponent, to be guardian of his children (as in and by the said will duly proved in the month of , 18 , and now remaining on record in the registry of this Honourable Court appears.) And I further make oath and say, that I am the guardian of the said minors duly appointed in and by the will of the said I. K., the natural and lawful father of the said minors;

or,

that I am the lawful and one of the next of kin of the said E. B., the lunatic aforesaid, and that I will faithfully administer the personal estate and effects of the said deceased for the use and benefit of the said E. F. and G. H., until one of them shall attain the age of twenty-one years (or, during his lunacy), by paying the just debts of the said deceased and distributing, &c. (Proceed as in No. 15, ante.)

No. 110.] OATH FOR ADMINISTRATION TO ATTORNEY OF INTESTATE'S HUSBAND, WIDOW, FATHER, OR OTHER PERSON ENTITLED.

(Style, &c.)

I, C. D., of _____, make oath and say, that A. B., late of _____, deceased, died intestate, leaving E. F., her lawful husband, who now resides at _____ in the East Indies ;

or,

E. F., his lawful widow and relict, who is now residing at _____, in Australia ; that I am the lawful attorney of the said, &c.;

or,

died a bachelor (or a spinster) and intestate, leaving surviving him (or her) E. F. his (or her) natural and lawful father and next of kin, who is now residing at _____, in the United States of America ;

or,

died a bachelor (or a spinster) and intestate, without a father, leaving surviving him (or her) E. F. widow, his (or her) natural and lawful mother and only next of kin, who is now residing at _____, in the East Indies ; that I am, &c. ;

or,

died a widow (or widower) and intestate ; that I am the lawful attorney of E. F., one of the natural and lawful children and one of the next of kin of the said deceased ;

or,

died a bachelor (or a spinster) and intestate, without a parent leaving surviving him (or her) E. F., his (or her) natural and lawful brother and only (or one of his) next of kin, who is now residing at _____, in Australia ;

or,

died a bachelor (or a spinster), without a parent, brother or sister, uncle or aunt, nephew or niece, and intestate, leaving surviving him (or her) E. F. his (or her) lawful cousin-german, and one of his (or her) next of kin, who is now residing in that part of Great Britain called England, and that I am the lawful attorney of the said E. F. ; that I will faithfully administer the personal estate and effects of the said deceased for the use and benefit of the said E. F., and until he shall duly apply for and obtain letters of administration of the personal estate and effects of the said deceased to be granted to him, by paying, &c.

(Proceed as in No. 15, ante.)

No. 111.] OATH FOR ADMINISTRATION LIMITED TO PROCEEDINGS IN CHANCERY BY BILL.
(*Style, &c.*)

I, E. F., of make oath and say, that on the day of 18 G. H. filed his bill of complaint in the Court of Chancery against I. K. and others, therein (amongst other things) setting forth (*state briefly the averments of the bill*), and praying relief in the premises as in the said bill is set forth :

And I further make oath and say, that divers proceedings have been had in the said suit, but that no further proceedings can be had therein until there is a legal personal representative of the said A. B. before the said Court of Chancery :

And I further make oath and say, that the said A. B., late of deceased, died on the day of 18 at intestate, a bachelor, leaving C. D., his natural and lawful father, who has renounced the letters of administration of all and singular the personal estate and effects of the said deceased :

And I further make oath and say, that I am nominated and appointed by and on the part and behalf of the said G. H. to apply for and obtain letters of administration of the personal estate and effects of the said deceased, under the limitations hereinafter mentioned, to be committed and granted to me as a person for that purpose named by and on behalf of him the said G. H. :

And I further make oath and say, that I will faithfully administer the personal estate and effects of the said deceased, limited to the purpose only (*See words of Limitation, ante p. 266*).

No. 112.] OATH FOR ADMINISTRATION LIMITED TO TRUST PROPERTY (VIZ. TO TRANSFERRING IT).
(*Style, &c.*)

I, C. D., of make oath and say, that in and by an indenture of settlement made the day of 18 between E. F. of of the first part, G. H. of of the second part, and the said A. B., deceased, therein described of of the third part, after reciting that a marriage was intended to be had and solemnized between the said E. F. and G. H., it was witnessed that the said A. B., his executors, administrators and assigns, should stand possessed of and interested in the sum of dollars, &c., upon trust, after the solemnization of the said intended marriage to pay the interest, dividends and annual produce of the said sum to the said G. H. for and during her life, and after her decease

to the said E. F. during his life, and after the decease of the survivor of them in trust for all and every or such one or more exclusively of the other or others of the children of the said G. H. by the said E. F. as ahe the said G. H. shall by deed or will appoint, and in default of such appointment in trust for all and every the children and child of the said E. F. and G. H., who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain the said age or marry as therein mentioned, and if there should be but one such child the whole to be in trust for that one child, his or her executors or administrators ; and it is provided in and by the said indenture, that if the said A. B. should depart this life, or decline to act in the trusts thereby created, it should be lawful for the said E. F. and G. H. and the survivor of them to appoint a trustee in the room of the said trustee so dying or refusing or declining to act for the purposes of the said indenture (as in and by the said indenture on reference being thereunto made will more fully appear) :

And I further make oath and say, that the said intended marriage was afterwards duly had and solemnized between the said E. F. and the said G. H., and there is issue of the said marriage one child only, the said E. F., who has attained the age of twenty-one years :

And I further make oath and say, that the said G. H. died on the day of 18 in the lifetime of her husband, intestate, and without having appointed the said trust estate or any part thereof by deed or otherwise :

And I further make oath and say, that the said A. B., who was late of deceased, died at on the day of 18 having made and duly executed his last will and testament bearing date the day of 18 and therein appointed I. K. sole executor and residuary legatee, and that the said I. K. hath renounced the probate and execution of the said will and letters of administration with the same annexed of all and singular the personal estate and effects of the said deceased :

And I further make oath and say, that the said E. F. under and by virtue of the power vested in him in and by the said indenture of settlement as aforesaid, hath in and by a certain deed of appointment bearing date the day of 18 nominated, constituted and appointed L. M. of and N. O. of to be trustees in the room of the said A. B., deceased, for all the purposes of the said indenture of settlement (as in and by the said last-mentioned deed will more fully appear) :

And I further make oath and say, that the said L. M. and N. O. have in and by an instrument under their hands and seals authorized me, this deponent, to procure letters of administration of the personal estate and effects of the said A. B., deceased, to be granted to me as a person for that purpose named by them and on their part and behalf, limited so far only as concerns all the right, title and interest of him the said deceased in and

to the said sum of dollars, &c., and all dividends and interest due and to become due thereon and for transferring the same into the names of the said L. M. and N. O., for the purpose of carrying into effect the trusts of the said indenture of settlement of the day of 18 but no further or otherwise :

And I further make oath and say, that I will faithfully administer the personal estate and effects of the said A. B., deceased, limited so far only as concerns all the right, title and interest of him the said deceased in and to the aforesaid sum of dollars, and all dividends and interest due and to become due thereon, and for transferring the same into the names of the said L. M. and N. O., for the purpose of carrying into effect the trusts of the said indenture of the day of 18 but no further or otherwise according to law ; that I will exhibit a true and perfect inventory. (*As in No. 15 ante.*)

Note.—The Oath for Administration limited to dealing with Trust Property may be framed from the last form ; And *vide* Coote, 553.

No. 113.] OATH FOR ADMINISTRATION LIMITED TO A POLICY OF ASSURANCE.

(*Style, &c.*)

I, C. D. of make oath and say, that the said A. B., late of deceased, died on the day of 18 , at , intestate a spinster without parent, brother or sister, leaving E. F. her lawful uncle and next of kin, who has duly renounced the letters of administration of all and singular the personal estate and effects of the said deceased :

That in the year 18 , I lent the said deceased various sums of money, and that by a certain policy of assurance bearing date the day of , numbered and under the hand of three of the directors of the Life Assurance Company, the sum of dollars was assured to be paid to the executors, administrators or assigns of the said A. B., together with such further sum or sums as should have been appropriated as bonuses to the said policy after proof being given of her death as therein mentioned. That the said assurance was effected in the name of the said A. B., but the same was so effected at the instance of me the said C. D. ; that although the said policy was never legally assigned to me, the same was never in the possession of the said A. B., but was delivered to me as my own property and effects, and is now in my possession or held for my benefit, and the premiums thereon were from the month of , 18 , to the death of the said deceased paid by me ; that I am the sole person equitably entitled to the said policy and to the money received thereby,

but that I am unable to obtain payment thereof for want of a legal personal representative of the said deceased; that I will faithfully administer to the personal estate and effects of the said deceased, limited so far only as concerns all the right, title, and interest of her the said deceased in and to the aforesaid policy of assurance numbered , in the said Life Assurance Company, and the said sum of . dollars secured thereby, and all profits, bonuses and accumulation thereon, and all benefit and advantage to be had, received and taken therefrom, but no further or otherwise; that I will exhibit, &c. (*conclude as in Number 15, ante*).

No. 114.]

ORDER FOR ALTERATION IN A GRANT.

In Her Majesty's Surrogate Court of, &c.

On the day of , in the year of our Lord 18 ,

In the goods of A. B., late of deceased.

BE IT KNOWN that on the day of , letters of administration of the rest of the personal estate and effects (*or letters probate, &c., as the case may be*) of the said deceased were granted to C. D. the lawful husband of the said deceased.

That in reciting the grant of probate made under certain limitations to E. F. one of the executors of the will of the said deceased, it is erroneously stated that power was herein reserved of granting probate to the other executor therein named [*or any other errors to be corrected or matter necessitating an alteration*].

That the name of the executor to whom power was so reserved, was and is as appears by the oath of the said C. D., to lead the said letters of administration, and that the insertion of the name in the said letters of administration instead of is a clerical error:

Whereupon it was ordered that the said letters of administration be altered by striking through with a pen the said name , and writing over the same the said name.

(Signed)

No. 115.] ORDER FOR GRANT TO GUARDIAN OF PARTY CITED.

In the Surrogate Court of . On the day of .

In the goods of E. F., late of , deceased.

A. B. against C. D.

ON READING the instrument of election by , whereby it appears that a citation has issued under seal of this Court, bearing date

the day of , 18 , at the instance of J. K., of , alleging himself to be a creditor of the said deceased, citing the said C. D., the residuary legatee named in the last will and testament of the said E. F., deceased, bearing date the day of , 18 , to accept or refuse the letters of administration, with the said will annexed, of the personal estate and effects of the said E. F., deceased, or show cause why the said letters of administration, with the said will annexed, of the personal estate and effects of the said deceased, should not be committed and granted to the said , as creditor of the said deceased; and it further appearing, by the said instrument of election, that the said C. D. is now an infant of the age of years only, and that L. M. is the lawful grandfather and next of kin of the said infant, and is ready and willing to accept the curation or guardianship of the said infant, for the purpose of appearing to the said citation and accepting the said letters of administration, with the said will annexed, of the personal estate and effects of the said E. F., deceased, as his curator or guardian, and obtaining the said letters of administration, with the said will annexed, to be granted to him as his curator or guardian for his use and benefit until he shall attain the age of twenty-one years; , the Judge of the Court assigned the said L. M. curator or guardian to the said infant for the purposes aforesaid.

No. 116.] ORDER FOR GRANT TO PARTY CITED.

In the Surrogate Court of .

On the day of 18 ,

W. against C. and B.

In the goods of A. B., deceased.

X. Y., the solicitor of D. B., the defendant in this cause, alleged that his party, by a citation issued under seal of this Court on the day of , 18 , had been duly cited to accept or refuse the letters of administration of all and singular the personal estate and effects of A. B., late of , deceased, the deceased in this cause, and that his party had entered an appearance to the said citation, and was willing to take upon him the said letters of administration: Wherefore the Judge of , &c., on his application, ordered that the said letters of administration should issue under seal of this Court to his said party, if entitled thereto, notwithstanding the caveat entered in the goods of the said deceased, by or on behalf of the plaintiff on his taking out the said citation.

In, &c.

In the goods of A. B., late of _____, deceased.

Whereupon it was ordered that letters of administration of all and singular the personal estate and effects of the said deceased be granted to the said E. F., the lawful widow and relict of the said deceased, and the said G. H. one of the natural and lawful children of the said deceased, jointly.

A. B. against C. D.

Whereupon it is ordered that probate of the said will be granted to the said A. B., the plaintiff in this cause, if entitled thereto.

No. 119.]

ORDER REVOKING PROBATE.

In, &c.

In the goods of A. B., late of , deceased.

BE IT KNOWN, that on the day of , 18 , probate of the will of the said A. B., deceased, bearing date the day of , 18 , was granted to C. D., the sole executor therein named :

AND BE IT KNOWN, that on the day of , 18 , an affidavit of the said C. D. was filed in the registry, of this Court by which it appears that the said deceased made and duly executed a will of a later date, to wit, bearing date the day of , 18 , whereof he appointed E. F. and G. H. executors :

AND BE IT KNOWN, that on the last-mentioned day H. I., of , the proctor [or solicitor] of the said C. D., on behalf of the said C. D., voluntarily brought in the said probate :

Wherefore it was ordered that the said probate be revoked, and declared null and void to all intents and purposes in law whatsoever.

No. 120.]

ORDER REVOKING LETTERS OF ADMINISTRATION.

In, &c.

In the goods of A. B., late of , deceased.

BE IT KNOWN, that on the day of , 18 , letters of administration of all and singular the personal estate and effects of the said A. B., deceased, were granted to C. D., the lawful second cousin of the said deceased, on the suggestion that the said deceased died intestate, a widower, without child or parent, brother or sister, uncle or aunt, nephew or niece, cousin german or cousin german once removed, and that he the said C. D. was one of the next of kin to the said deceased :

AND BE IT KNOWN, that on the day of , 18 , an affidavit of the said C. D. was filed in the registry of this Court, by which it appears that the said deceased died intestate, a widower, without child or parent, brother or sister, uncle or aunt, nephew or niece only, and not without cousin german or cousin german once removed, as erroneously stated in the said letters of administration :

AND BE IT KNOWN, that on the last-mentioned day, E. F. of the proctor [or solicitor] of the said C. D. on behalf of the said C. D., voluntarily brought in the said letters of administration :

Wherefore it was ordered that the said letters of administration be revoked and declared null and void to all intents and purposes in the law whatsoever.

No. 121.] RENUNCIATION OF LETTERS OF ADMINISTRATION BY GUARDIAN
OF MINOR AND INFANT.

In the Surrogate Court of .

In the goods of , deceased.

WHEREAS A B., late of , deceased, died on the day of , 18 , at , a widower and intestate, leaving C. D., E. F. and G. H., his natural, lawful and only children, only next of kin, and the only persons entitled in distribution to his personal estate and effects : and whereas the said C. D. and E. F. are now respectively in their minority, to wit, the said C. D. of the age of years and upwards, and the said E. F. of the age of years and upwards, but respectively under the age of twenty-one years, and the said G. H. is now in his infancy, to wit, of the age of years only ; and whereas the said C. D. and E. F., the minors aforesaid, have in and by an instrument under their respective hands expressly elected me, the undersigned J. K., their lawful and only next of kin, to be their curator or guardian for the purpose of renouncing in their names, and on their part and behalf, all their right, title and interest in and to the letters of administration of the personal estate and effects of the said deceased : and whereas I have been duly assigned the curator or guardian of the said G. H., the infant aforesaid :

Now I, the said J. K., do hereby, as curator or guardian of the said minors and infant, renounce all their right, title and interest in and to the letters of administration of all and singular the personal estate and effects of the said A. B., deceased.

In witness, &c. (as in No. 25 ante).

No. 122.] RENUNCIATION AND CONSENT.

In, &c.

WHEREAS A. B., late of , deceased, died on the day of , 18 , at , intestate, a bachelor, leaving me, the undersigned C. D., of , his natural heir and lawful father, and next of kin :

Now I, the said C. D., do hereby renounce all my right and title in and to the letters of administration of the personal estate and effects, rights and credits, of the said deceased, and I do also hereby consent that letters of administration of the said personal estate and effects, rights and credits, may be granted to E. D., the natural and lawful brother of the said deceased.

In witness, &c. (see last Form).

No. 123.]

RENUNCIATION OF GUARDIANSHIP.

In, &c.

Murdoch (all in Murdoch)
 WHEREAS, A. B., late of *York County* deceased, died on the *1st* day of *January* 189*8*, at *York* having made and duly executed his last will and testament, bearing date the *3rd* day of *June* 189*8* and therein appointed C. D. sole executor and residuary legatee; and whereas the said C. D. is now a minor of the age of *15* years only;

And whereas, I, the undersigned, E. F., am the natural and lawful and only next of kin of the said C. D.:

Now I, the said E. F., do hereby renounce all my right and title in and to the curation or guardianship of the said minor, and I appoint J. K., of *York* my solicitor or attorney to file or cause to be filed this renunciation for me in the registry of this Court.

Witness, &c. (See last form) (a).

No. 124.]

RETRACTATION.

In, &c.

WHEREAS, A. B., late of *York* in the county of *York* deceased, died on the *1st* day of *January* 18*98*, at *York* having made and duly executed his last will and testament, bearing date the *3rd* day of *June* 18*98*, and thereof appointed C. D. executor, and me, the undersigned C. F., residuary legatee: And whereas, the said C. D. duly renounced the probate and execution of the said will, and I, the said E. F., also duly renounced letters of administration, with the said will annexed, of all and singular the estate and effects, rights and credits of the said deceased: And whereas letters of administration, with the said will annexed, of all and singular the personal estate and effects, rights and credits of the said deceased, were on the *1st* day of *January* 18*98* granted by this Court to G. H., a creditor of the said deceased: And whereas, the said G. H., for some time intermeddled in the personal estate and effects of the said deceased, but is since dead, to wit, on the *1st* day of *January* 18*98*, leaving part thereof unadministered and not fully disposed of:

Now I, the said E. F., do hereby declare, that I retract the renunciation of the letters of administration, with the said will annexed, of all and singular the personal estate and effects of the said deceased, so as afore-

(a) For other Renunciations *vide ante*, p. 113.

E E

said by me heretofore made, and I hereby nominate and appoint M. N., of my proctor (solicitor or attorney), to file or cause to be filed this retraction for me in the Surrogate Court aforesaid.

In witness whereof I have hereunto set my hand and seal this day of in the year 18 .

Signed, sealed and delivered in }
the presence of }

No. 125.] ORDER REMOVING CAUSE FROM SURROGATE COURT TO COURT
OF CHANCERY.

IN CHANCERY : } (Date.)
IN CHAMBERS. }

In the goods of Andrew Mercer, deceased :

and

BETWEEN, &c., (*Style of Cause*).

Upon the application of the defendants, and upon reading the affidavit and papers filed, and upon hearing what was alleged by counsel for all parties, and it appearing that a disputed question may be raised as to whether the will propounded for proof in the Surrogate Court of the County of York by the plaintiffs is in fact the will of the said Andrew Mercer, deceased. And it appearing that the personal estate of the said deceased exceeds two thousand dollars in value, and that the said cause or proceeding is of such a nature and of such importance as to render it proper that the same should be withdrawn from the jurisdiction of the said Surrogate Court, to be disposed of by this Court.

It is ordered that the said cause or proceeding testamentary be withdrawn from the jurisdiction of the said Surrogate Court and removed into this Court ; And that the same be heard, tried and disposed of by this Court, and that the pleadings and proceeding therein do stand in the same plight and condition as the same are in now in said Surrogate Court ; And that the documents, instruments, affidavits and papers in the said cause or proceeding deposited or filed in the Surrogate Court be forthwith transmitted to the registrar of this Court at Osgoode Hall.

(Signed)

GEO. S. HOLMESTED,
R. C. C.

No. 126.] WARRANT TO ATTORNEY-GENERAL TO TAKE ADMINISTRATION (a).

ONTARIO.

By His Excellency the Honourable William Pearce Howland, Companion of the Most Honourable Order of the Bath, Lieutenant-Governor of the Province of Ontario, &c., &c., &c.

To the Honourable Adam Crooks, Attorney-General for the Province of Ontario:

WHEREAS, Andrew Mercer, formerly of the City of Toronto, died on or about the thirteenth day of June, in the year of our Lord one thousand eight hundred and seventy-one unmarried, intestate, without lawful issue, heirs or next of kin, but possessed of personal estate and effects;

NOW BE IT KNOWN, that I, the said William Pearce Howland, by virtue of the authority in me reposed as Lieutenant-Governor of the Province of Ontario, acting for and on behalf of Her Majesty the Queen, hereby nominate and appoint you, the said Adam Crooks, as Her Majesty's Attorney-General for the said Province, in your name, and as such Attorney-General, to apply for, take and assume the administration, (*to you and your successors in office,*) and letters of administration thereof to receive of all and singular the goods and chattels, personal estate and effects which were of the said Andrew Mercer, deceased.

Given under my hand and seal at arms at Toronto, this 23rd day of May, in the year of our Lord 1872, and in the 35th year of Her Majesty's reign.

By command.

(Signed)

PETER GOW,

Secretary.

NOTE.—The insertion of the words "*to you and your successors in office,*" and other alterations, would appear to be necessary by the Statute passed since the above date. *Vide App.* For another Form see Dodd & Brooks, p. 515.

No. 127.] ADMINISTRATOR'S NOTICE TO CREDITORS.

The creditors of A. B., , late of the , deceased, who died on or about the day of , and all others having claims against his estate are hereby notified to send by post, prepaid, or otherwise deliver to the undersigned, administrator of the estate and effects of the said deceased, at No. street, Toronto, or to Messrs. S. & W., Solicitors, No. street, Toronto, on or before the day of , their Christian names and surnames, addresses and description, the full particulars

(a) *Vide ante*, p. 219.

of their claims, a statement of their accounts, and the nature of the securities (if any) held by them : and in default thereof, and immediately after the said day of , the assets of the said , deceased, will be distributed amongst the parties entitled thereto, having regard only to claims of which notice shall have been given as above required : And this notice being given under the provisions of the Revised Statutes of Ontario, chap. 107, sec. 34, the administrator will not be liable for the said assets, or any part thereof to any person of whose claim notice shall not have been received by him or his said solicitors at the time of such distribution.

S. & W.,
Solicitors.

C. D.,
Administrator. (a)

Where an inventory is filed in Common Form Business upon taking a Grant of Probate or Administration, the following will be found a convenient form unless a more detailed statement should be ordered by the Judge :—

No. 128.] INVENTORY OF THE PERSONAL ESTATE AND EFFECTS OF ,
DECEASED.

In Her Majesty's Surrogate Court of the County of
In the goods of

	Price of Stocks.	Actual Value.
Cash in the house and at the bankers	\$ cts.	\$ cts.
Household goods, linen, wearing apparel, books, plate, jewels, carriages, horses, &c., valued at		
Stocks or funds of Canada transferable in Ontario, viz.:— Dividends thereon		
Foreign stocks or funds transferable in Ontario, viz.:— Dividend thereon		
Leasehold property :— Value per annum Ground rent on do. per annum Length of unexpired term.		
Rents of real or leasehold property due at the death of the deceased.		
Rents of leasehold property due since the death of the deceased.		

(a) An Executor's Notice may be framed from this.

	Price of Stocks.	Actual Value.
Proprietary shares or debentures of public companies, viz.:	\$ cts.	\$ cts.
Dividends or interests thereon		
Money out on mortgage and other securities		
Interest thereon		
Book debts		
Bonds and bills		
Notes		
Interest thereon		
Real estate contracted to be sold		
Personal estate and effects left by the will under some authority enabling the deceased to dispose of the same as he or she might think fit (a)		
Stock in trade, farming stock and implements of husbandry, valued at		
Other personal property not comprised under the foregoing heads, viz. :—		

(No Deductions to be made on account of Debts owing by Deceased.)

No. 129.] JUDGE'S APPOINTMENT TO EXAMINE, AUDIT AND PASS ACCOUNTS OF EXECUTOR, OR &C.

In the Surrogate Court of

In the goods of , deceased.

I appoint the day of , at o'clock, in the noon, at my Chambers in the Court House in the of , for the purpose of examining, auditing, and passing the accounts of as executor (or administrator, &c), of the estate of , deceased, now filed , and to fix the compensation to be allowed to him out of the said estate for his care, pains, trouble and time expended in or about his executorship (or as the case may be). At which time let all parties interested attend.

Dated at, &c.

Judge Surrogate Court.

(a) This was only to be inserted where the testator died after Imp. Stat. 23 Vic, c. 15. Vide Coote, 3rd Ed. 400; 3 Jur. N. S. P. II. p. 207.

No. 130.] EXAMPLE OF EXECUTOR'S OR ADMINISTRATOR'S ACCOUNT.

In the Surrogate Court of

In the goods of , deceased.

THIS ACCOUNT marked A. was produced and shown to A. B., C. D. and E. F. (or as the case may be), and is the account referred to in their affidavit sworn this day of ,
Before me (officer before whom sworn).

RECEIPTS.				DISBURSEMENTS.					
No. of Item.	Date when received.	Names of persons from whom received.	On what account received.	Amount received.	No. of Item.	Date when paid or allowed.	Names of persons to whom paid or allowed.	For what purpose paid or allowed.	Amount paid or allowed.
18—				\$ c.	18—				\$ c.
1		Cash.....	Found in house		1		Jas. Stone..	Undertaker's bill for funeral	
2		The Imp. Bk.	Balance at bankers ...		2		Ed. Coke...	Solicitor's bill for probate (or administration).....	
3			Half-year's dividend on \$2,000, 6 per cent. Dominion stock due		3		Dr. Adams..	A debt due to him for medical attendance	
4		Jno. Jones..	Half-year's rent of freehold due ...		4		Jas. Burns..	Bond debt of \$1,000 and \$25 for interest thereon from — to —,	
5		And. Mercer	Bond debt of \$300 and interest from —to—.		5		Jno. Upper.	Legacy under will (or distributive share)	
6		Jas. Taylor..	Half year's rent of leasehold house due		6		Publisher of — news-paper	Advertising under Property and Trusts Act notice to creditors to send in claims	
7		"	Proceeds of real estate contracted to be sold. .						

SPECIFIC LEGACIES LEFT BY THE TESTATOR.

1. To his widow Jane , all his household furniture (*following the words of the will*).
2. To his son John , the testator's gold watch, and horses and carriage (*following the words of the will*).

NOTE.—Particulars or Explanations of any item may be given in separate sheets annexed, and referred to in the account.

No. 131.] .EXAMPLE OF BILL OF COSTS—IN COMMON FORM BUSINESS.

For Probate when Personalty sworn under \$1200.00.

1880.	Atty's fees.	Disbt's.
Consulting fee.....	\$1 00	
Preparing all necessary papers and proofs, and passing Probate.....	2 00	
<i>Fees paid in Registry.</i>		
To the Crown :		
On Application.....	\$0 50	
On Certificate of Surrogate Clerk.....	0 50	
On Grant.....	1 00	
		\$2 00
To the Judge :		
On Grant of Probate.....	2 00	
<i>(If property devolving is over \$2,000.00, see Schedule to Act.)</i>		
On fiat for Probate.....	0 50	
“ “ Inventory (if ordered).....	0 50	
		3 00
To the Registrar:		
Receiving and entering Application, and transmitting Notice to Surrogate Clerk...	0 50	
Receiving and entering Certificate Surrogate Clerk.....	0 10	
Fee on Papers, Affidavits, &c.....	1 00	
On grant of Probate and entering.....	1 00	
Recording will, say 10 folios, 10c. per folio	1 00	
Letters Probate and Seal.....	0 50	
Transcript of Will annexed to Probate, 10 fo.	1 00	
Certified copy for Surrogate Clerk.....	1 50	

	Atty's fees.	Disb'ts.
1880.		
Notice of Grant to Surrogate Clerk	0 25	
Postages.....(say)	0 10	
(If property devolving is over \$1,200.00, see Schedule to Act.)		
Bill of Costs.....	0 50	6 95
	<u>\$3 50</u>	<u>\$11 95</u>

NOTE.—Bills of Costs in cases in which the personalty exceeds \$1200.00, and on obtaining Letters of Administration, or Administration with will annexed, or Letters of Guardianship, and in cases of Limited or other Special Grants, may readily be formed from the foregoing and the Tables and Schedules of Fees, *ante*.

No. 132.] PETITION FOR PROBATE OF MILITARY WILL, OR WILL OF A
MARINER AT SEA.

Unto the Surrogate Court of

The petition of A. B., of the of , in the County of ,
merchant

HUMBLY SHEWETH,

That C. D., who last dwelt in , in said County of , died
at , on the day of &c., , possessed of goods and estate
remaining to be administered, leaving a widow, and his only heirs at law
and next of kin the persons whose names, residence, and relationship
to the deceased are as follows, viz., &c., &c.; that said C. D., at the
time of his death, was a mariner at sea, on board the ship , in the
course of a voyage from to (or, was a soldier in actual service
in the regiment, &c.); That while on such voyage (or, in such actual
service) said deceased made a nuncupative will, in the presence and hear-
ing of E. F. and G. H., of, &c., whereby he disposed of his wages and
other personal estate in the manner following (or, as is fully set forth in
the paper hereto annexed).

Your petitioner therefore prays that said nuncupative will may be
proved and allowed, and letters probate, or letters of administration,
with the will annexed, may be granted to your petitioner as executor,
or &c.

No. 133.] DECLARATION OF TRANSMISSION UNDER THE "ACT RELATING
TO BANKS AND BANKING," 34 VIC. CH. 5 STATS. CANADA.

I, A. B. (*or we*) of
Do declare that one Andrew Mercer, late of the deceased, who
departed this life on or about the day of intestate (*if so*) was
at the time of his death entitled to certain shares in the capital stock of
the Bank of standing in his name on the books of said bank,
and letters of administration of all and singular the personal estate and
effects, rights and credits (*or, and letters probate of the will*) of the said
A. M. deceased, having been on the day of granted to me by
Her Majesty's Surrogate Court of the County of the right to said
shares and to all interest and dividends thereon, has by virtue of said let-
ters of administration (*or, by virtue of said will*) become transmitted to
me, and I am entitled to receive the same as administrator of said estate
(*or, as such executor as aforesaid*).

In witness whereof I have hereunto set my hand at the of
this day of A.D. 18 .

Acknowledged by the said A. B. }
at the of in the } A. B.
County of this day of }
A.D. 18 . Before me,
[L.S.] A Notary Public for Ontario.

No. 133a.] FORMS OF JURAT.

If one deponent only :—

Sworn at on the day of A.D. 18 ,
Before me,

If more than one deponent :—

Sworn by the said and (*give the Christian and surnames of*
each deponent) at on the day of A.D. 18 ,
Before me,

If the deponent be a marksman, or is blind or illiterate :—

Sworn by the said at on the day of A.D. 18 ,
this affidavit having been first read over to him (*or her*), who seemed
perfectly to understand the same, and made his (*or her*) mark
thereto in my presence,
Before me,

If the deponent be unacquainted with the English language :—

Sworn by the said at on the day of A.D. 18 ,
by interpretation into the language by C. D. of who
had previously sworn that he was well acquainted with both lan-
guages, and faithfully to interpret.

(The interpreter should sign his name on the affidavit for the purpose of identification.)

N.B.—In all cases of affirmation the exact words prescribed by the statute applicable to the particular case must be used, and none other will be received.

The persons permitted to affirm by R. S. O. c. 62, s. 12, must first make the following declaration and affirmation :—

“ I, A. B., do solemnly, sincerely, and truly declare and affirm that I am one of the Society called Quakers, Menonists, Tunkers, or Unitas Fratrum, or Moravians ” *(as the case may be)*; and the affirmation will commence :—

“ I (A. B.), do solemnly, sincerely, and truly affirm and declare,” &c. ; And the jurat must correspond.

No. 134.] DOMINION GOVERNMENT SAVINGS BANK — MISSING PASS-
BOOK OF A DECEASED DEPOSITOR—DECLARATION OF EXECUTORS, ADMIN-
ISTRATORS, &c.

 of do hereby solemnly declare that have been ap-
pointed to the estate of the late of ; that believe
 was a depositor in the Government Savings Bank at and
hereby declare that after due and diligent search the pass-book issued by
the of the said bank cannot be found *(here state facts, if any, re-
lating to the loss of book)*, therefore as such , do hereby surrender
all claim to any balance recorded in the said pass-book, and declare that
the estate has no further claim in respect thereof except as to the amount
recorded in the books of the said branch, and hereby testify con-
sent that any balance in the said savings bank shall be managed in accord-
ance with the Act 34 V. c. 6, and the regulations of the bank established
in accordance therewith, and make this solemn declaration, conscien-
tiously believing the same to be true, and by virtue of the Act passed in

the thirty-seventh year of Her Majesty's reign, intituled "An Act for the Suppression of Voluntary and Extra Judicial Oaths."

Solemnly declared before me, at } (Person declaring to sign here).
 the of in the }
 of and Province of }
 this day of 18 .

(Judge, J. P., or Notary's signature }

N. B.—Above declaration, to be made before any Judge, Justice of the Peace, Notary Public, or other functionary authorized by law to administer an oath.

NOTE.—The above and other necessary forms are furnished at the branch offices.

No. 135.] ADOPTION OF INFANTS OR MINORS. FORM OF INDENTURE
 UNDER R. S. O. CH. 135. (38 V. c. 19.)

THIS INDENTURE, made and entered into this day of, &c.

Between A. B., of (residence and addition), of the First Part, and C. D., of, &c., of the Second Part.

Whereas, the party of the 1st part is the mother (or father, or guardian duly appointed by, &c., or a charitable society, &c. (see Stat.), as the case may be) of the child hereinafter mentioned, the same being female (or male) infant child, named and of the age of having been born on the day of 18, at the of

And whereas, the father of the said child hath departed this life, and the said party of the 2nd part is the uncle of the said child (or as the case may be), and the said party of the 1st part, being satisfied that the said party of the 2nd part is a respectable and trustworthy person, is desirous that the said child should be adopted by him, the said party of the 2nd part, into his family, to be henceforth under his guardianship, care, custody, and control, and for that purpose hath delivered said child to the said party of the 2nd part. And whereas, the said party of the 2nd part is willing to adopt the said child into his family, and assume towards her the duties of a parent;

NOW THIS INDENTURE WITNESSETH that, in consideration of the premises, and of the care and guardianship to be bestowed upon said child, and of the covenants, promises, and agreements hereinafter contained by and on the part of the said party of the 2nd part, he, the said party of the 1st part DOETH hereby constitute and appoint the said party of the 2nd part to be sole guardian of said child, and doth hereby transfer to him all his rights and power over or concerning said child, whether by statute, com-

mon law or otherwise, and DOTH GRANT to him, the said party of the 2nd part, full custody of the person of the said child, for nurture, government, maintenance and education, during its minority, and for him, the said party of the 2nd part to have, possess, and exercise the same guardianship, care and authority over the said child as he would or could have were it his own child, and without any interference therein by or on the part of him, the said party of the 1st part.

And the said party of the 2nd part, in consideration of the premises, and of the delivery to him of the said child as aforesaid, and of the love, affection and duty to be received by him from said child, and of the covenants hereinafter contained on the part of the said party of the 1st part, DOTH hereby adopt the said child and take her for his own, and doth hereby assume the duties of a parent towards the said child, and doth hereby covenant, promise and agree to and with the said party of the 1st part, that he will perform the duties of a parent towards the said child, in like manner as if it were his own child, and that he will protect, maintain and educate it, providing for it a home, and suitable food and clothing, and in case of sickness medical attendance, medicines, and all other necessities, and that he will pay due attention to her moral and spiritual culture, and afford her opportunity of becoming instructed in the teachings and doctrines of Christianity, during the period of his guardianship, as aforesaid.

And the said party of the 1st part, in consideration of the premises, doth hereby release to the party of the 2nd part, and for ever relinquish all his rights and powers in respect of the care, custody, and control of the said child hereinbefore transferred to the said party of the 2nd part. And the said party of the 1st part hereby covenants, promises, and agrees to and with the said party of the 2nd part that he will not at any time hereafter resume or attempt to resume, or regain, the possession, custody, control or guardianship of the said child, or in any way whatsoever interfere therein with the said party of the 2nd part :

And that he will at any time hereafter, at the request and charges of the party of the 2nd part, execute such further instruments or assurances as may be necessary for more effectually transferring and assuring to the party of the 2nd part the sole custody, control, and guardianship of the said child.

(If the minor be of the age requiring his or her consent under the statute, add a consenting clause, and let him or her execute the instrument.)

In witness whereof the parties hereto have hereunto set their hands and seals.

Signed, sealed, and delivered }	(L.s.)
in presence of }	(L's.)

NOTE.—The above form is prepared with reference to R. S. O. ch. 135, by which

parents, guardians, and other persons, or any charitable society authorised as there provided, having the care or charge of any minors, may, with the minor's consent, if a male not under 14 years, or a female not under 12 years, and without such consent if under such age, constitute by indenture, to be guardian of the child, any respectable trustworthy person, who is willing to assume and, by indenture or other instrument in writing, does assume the duty of a parent towards the child; such guardian to possess the same authority over the child as he or she would have were the ward his or her own child, and bound to perform the duties of a parent towards such ward.

By the laws of some of the neighbouring States, the adoption of children with the changing of their names is required to be with the sanction and approval of the Probate Judge. (*Vide* Smith's Probate Law, *supra*.) The statute above referred to, however, does not require the approval of Surrogate Judges to the adoption of children in Ontario. A guardian appointed by the Surrogate Court or a testamentary guardian would, it is presumed, be competent to execute such an indenture.

SHORT FORMS OF WILLS.

With attestation clause showing compliance with the "Wills Act of Ontario," as to execution (a), and according to Hayes and Jarman's concise Forms of Wills, 7th Ed.

No. 136.] WILL, GIVING TO ONE ABSOLUTELY ALL THE TESTATOR'S REAL AND PERSONAL ESTATE.

THIS IS THE LAST WILL AND TESTAMENT of me (*testator's name, residence and quality*), I devise and bequeath all the real and personal estate to which I shall be entitled at the time of my decease unto (*devisee's name, residence and quality*) absolutely; but as to estates vested in me upon trust or by way of mortgage, subject to the trusts and equities affecting the same respectively.

(a) ATTESTATION CLAUSE: Although it is true that an attestation clause is not absolutely necessary to the validity of a will, yet it is important that there should be one.

(*Vinnecombe v. Butler, ante* p. 178, and *vide ante*, 179).

PUBLICATION.—Although 'publication' is abolished, the testator should,—not as a matter of absolute legal necessity, but as a proper precaution—also explain to the witnesses the nature of the instrument they are required to sign, and the object with which their names are to be written. (*Flood on Wills*, 317).

No. 138.] WILL, DISPOSING OF REAL AND PERSONAL ESTATE, IN FAVOUR
OF TESTATOR'S DAUGHTER, A MARRIED WOMAN, FOR HER
SEPARATE USE.

THIS IS THE LAST WILL AND TESTAMENT of me (*testator's name, residence, and quality*). I devise all my messuages and hereditaments, situate at
in the County of , and all other, the real estate to which I
may be entitled at my death, to such uses, for such estates, and generally
in such manner as my daughter (*name*), the wife of , shall whilst
covert by will or when discoverd by deed or will appoint; and in de-
fault of such appointment, to the use of and (*names of trustees*),
their executors, administrators and assigns, during the life of my said
daughter, upon trust to pay the rents and profits of the said messuages
and hereditaments to my said daughter for her separate use, independently
of her present or any future husband, without power of anticipation, and
for such rents and profits, the receipts of my said daughter shall alone be
sufficient discharges to the said trustees; and from and after the death of
my said daughter, to the use of the person or persons, and if more than
one, in equal shares, his, her or their respective heirs and assigns, who,
at the death of my said daughter, would be entitled by descent, to the
said messuages and hereditaments, in case she had died intestate, and
seized thereof in fee simple by purchase.

I bequeath all the personal estate of which I shall die possessed, unto
the said and (*trustees' names*), their executors, administrators
and assigns, upon trust to convert the same into money; and after pay-
ment thereof, of my debts, funeral and testamentary expenses, to invest
the residue in their names, in or upon any of the Parliamentary stocks or
public funds of the Dominion of Canada, or upon mortgage of freehold,
or leasehold estates in this Province, or upon the debentures or debenture
stock of any Railway Company, or share in any incorporated Building
Society in this Province, with power to vary the investment from time to
time, for any other or others of the kinds prescribed; and upon further
trusts to pay the income and annual proceeds of the said investments to my
said daughter (*name*) during her life, for her separate use, independently of
her present or any future husband, without power of anticipation, for which
income the receipts in writing of my said daughter shall alone be sufficient
discharges to my trustees; And from and after the death of my said
daughter, as to as well the capital as the income and annual proceeds of
the said investments, upon trust for such person or persons, and if more
than one in such shares, and generally in such manner as my said
daughter shall by will appoint, and in default of any such appointment,
and so far as any partial appointment shall not extend, upon trust for the

person or persons, who, at the death of my said daughter, shall be of kin to her, and who under the Statute for the distribution of intestates' effects, would be entitled to her personal estate, if she had died a widow and intestate, such persons, if more than one, to take in the shares prescribed by the same Statutes.

I revoke all prior wills, and appoint the said and to be executors of this my last Will and Testament.

In witness, etc.

THE FORMER COURT OF PROBATE OF UPPER CANADA (a).

Officials Principal :—

DAVID BURNS, ESQUIRE,	1796.
DONALD McLEAN, “	1806.
GRANT POWELL “	1814.
WILLIAM HEPBURN, “	1838.
SECKER BROUGH, “	1844.
ROBERT E. BURNS, “	1846.
SECKER BROUGH, “	1847.

Registrars :—

ALEX. BURNS, ESQUIRE.
MILES McDONELL, “
JOSHUA WILCOCKS “
W. W. BALDWIN, “
STEPHEN HEWARD, “
JAMES FITZGIBBON, “
CHARLES FITZGIBBON, “

SURROGATE COURT, HOME DISTRICT, UPPER CANADA.

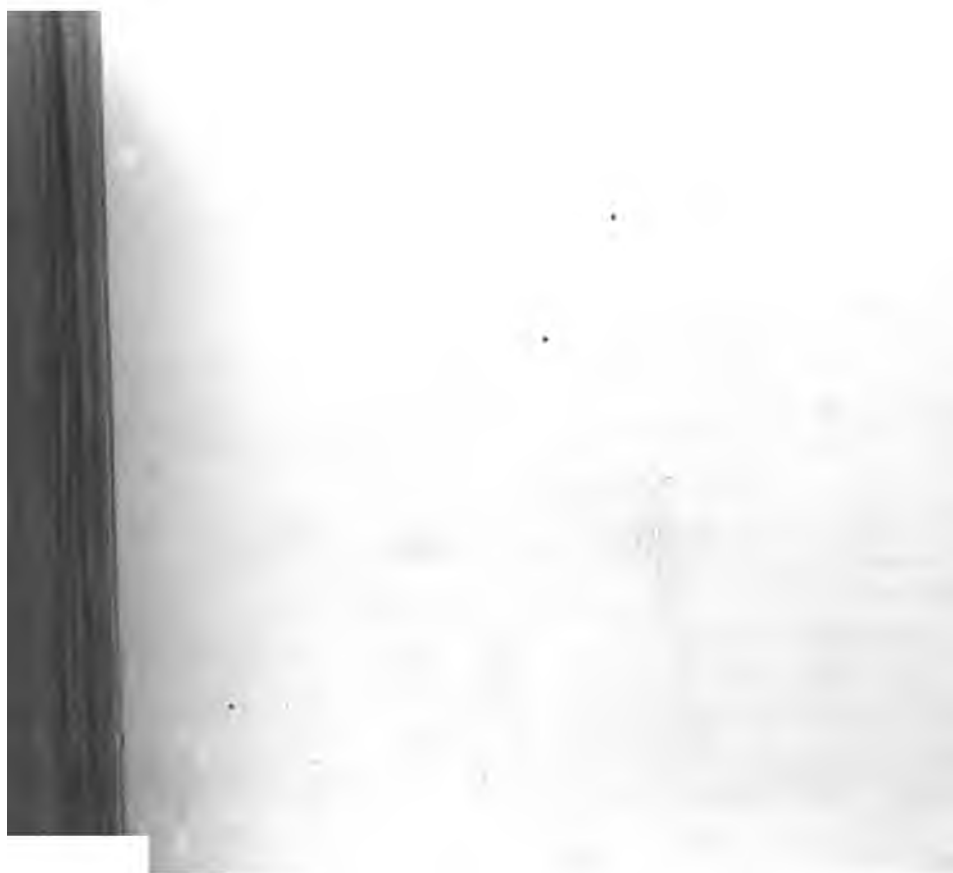
Surrogate Judges :—

WILLIAM WILCOCKS, ESQUIRE,	1800
ROBERT BALDWIN, “	1813
W. W. BALDWIN, “	1816
JOHN GODFREY SPRAGGE, “	1836
WILLIAM HUME BLAKE, “	1841
SAMUEL BEALEY HARRISON, “	1845

Judges under the Surrogate Courts Act :—

THE COUNTY COURT JUDGES.

(a) *Vide ante*, p. 11.



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